

**Native Title And The Tide of History:
Shifting The Sands**

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Abstract

This thesis is designed to contribute to the discussion of the issues confronting Australian Courts by evaluating the process of recognition and protection of native title and to delineate how it is being shaped. The High Court of Australia's decision in *Mabo v. The State of Queensland [No.2]* (1992) C.L.R. 1 and the subsequent *Native Title Act 1993* (Cth) in Australia have begun the process of recognition and protection of native title. This thesis looks at the scope of the High Court and some Federal Court of Australia decisions since *Mabo [No.2]*, and examines the relationships at law that underlay a theoretical foundation for those decisions. Two relationships underlay the Courts' reasons: relationships to history, and relationships to land. Australian Courts are articulating a particular conception of these relationships, and the foundation of this thesis is to propose a shift in native title discourse to include indigenous perspectives when determining native title claims.

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Chapter One

Introduction: Defining Relationships

The common law is articulating native title. The purpose of this paper is to step inside that sphere of articulation and delineate how it is being shaped. This thesis is an examination of the two relationships at law that underlay a theoretical foundation for Australian decisions. It looks at the scope of the High Court and some Federal Court of Australia decisions since *Mabo [No.2] v. Queensland*¹ [hereinafter *Mabo [No.2]*] and the two relationships lying behind the decisions: the relationships between indigenous and non-indigenous Australians to their shared and separate histories, and to the territory which they share. Australian Courts are allowing the non-indigenous conception of these relationships to overwhelm the indigenous perspective.

There is a tendency, often unconscious, to import or define Aboriginal culture in native title claims in terms of western knowledge. Such an approach is erroneous and irrelevant to Aboriginal people, because it creates and articulates an artificial characteristic in the tradition, custom or practice of native title. To understand why, one needs to observe the disparate foundations of Aboriginal and western culture.

In western liberal theory, society is comprised of individuals who are autonomous. Liberal theory is dominant. This describes the core of western relationships to history, land and society. It provides the corner stone for the western social fabric. History more often than not depicts winners, and is written by winners. Land is all about ownership.² Society is constructed around these notions of “ownership” and the individualistic society is one far removed from indigenous perspectives.

This individualistic notion of rights and interests can be contrasted with a more communal perception of society that is constructed upon stewardship for the land and

¹ (1992) 175 C.L.R. 1; 107 A.L.R. 1 [cited to C.L.R.].

² Ownership is a difficult concept. It is most commonly used as a statement of relations between people with respect to a thing. In this discourse that thing is land. See Chapter Four. In *Yanner v. Eaton* (1999) 201 C.L.R. 351; 166 A.L.R. 258 [cited to A.L.R.] at 266 the High Court observed

responsibilities. That foundation dictates comparative perceptions of history, land and society. Immediately there is a tension between a stewardship of rights and obligations that knit the indigenous social fabric and that of western society that advocates the rights of the individual. These opposite views reflect the disparity between indigenous and non-indigenous views. Colonial history and conceptions of English property are at the forefront of native title claims. Yet Aboriginal tradition derives from a different regime, from a different relationship with history and land. Furthermore, it remains malleable. The High Court is being asked not to blur the distinction, but to visualise and accommodate it in the determination of native title claims.³

There are a number of contextual historical factors that Australian Courts have yet to fully embrace such as the competing written and oral histories in demanding proof of native title. An examination of the more contemporary understandings of history in chapter three reveals the significance of relationships to land. How that relationship is constructed and visualised by the Court impacts heavily upon the articulation of native title and is more often than not the point of division amongst members of the bench. Property as an analytical tool is complex. At common law the theoretical foundations of property vary. The principal deponents in native title claims such as the Crown, third parties and claimants have different perspectives of land, and land as property. To date the Aboriginal relationship to land as articulated by the Courts has oscillated between common law theories of property as an interest in land or a bundle of rights.

This thesis seeks to shift the discourse in native title to include indigenous perspectives. The shifting of the sands towards a more contextual approach is proposed in two ways, first by looking at indigenous relationships to history, and secondly, to land as a legal relationship that can recognise and protect indigenous relationships to traditional territories. A shift to a more contextual approach where indigenous relationships to land and property are evaluated within the indigenous paradigm will ensure the Aboriginal

the term connotes a legal right “to have and to dispose of possession and enjoyment” of the subject matter.

³ For example see *Yorta Yorta Aboriginal Community v. Victoria* (2001) 110 F.C.R. 244, 180 A.L.R. 655; heard by the High Court in May 2002. The decision of the High Court is reserved.

perspective is not further washed away by the tide of history. I set these indicia out as practical guidelines to those trying to understand the decisions and for those making such decisions. Later in this paper I will argue that a broad multi disciplinary approach by the Courts is desirable in order to provide legal and conceptual space for legal pluralism in Australia.

I will also argue that the Courts are articulating particular conceptions of these relationships that are void of indigenous perspectives. It will be my contention that three issues are emerging before the Court, and those issues result from the preconceptions of the two identified relationships. The first is evidentiary: Aboriginal rights and interests are at the risk of being frozen in time if the Courts ignore indigenous perspectives. Some members of the judiciary demand a "timeless quality".⁴ The second is that conceptions of property are the catalyst for division on the bench. Australian judges and Courts appear divided on relationships to property and the idea of coexistence, or sharing of interests in land. A key component of coexistence, and the third issue, is the emergence over the years, but perhaps stronger now, of a legal pluralism.

Chapter two begins with a review of recent Australian judicial pronouncements. In the process of tracing the decisions that began with *Mabo [No.2]* I will identify the two constructs underlying the case law outlined above: opposing indigenous and non-indigenous relationships to history and land. An analysis of the recent decisions of the High Court and Federal Court will reveal that the "dynamics of 'frontier' relationships persist into the present".⁵ Those decisions lay the foundation for the critique. What

⁴ D.C. Harris, *Fish, Law and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001) at 209.

⁵ P. Havemann, (ed) *Indigenous Peoples Rights in Australia, Canada, & New Zealand* (New Zealand: Oxford University Press, 1999) at 1. For prime examples of Australian cases where the dynamics of frontier relationships persist see *Cubillo & Gunner v. Commonwealth* (2000) 174 A.L.R. 97; 103 F.C.R. 1 [hereinafter *Cubillo*] and *Nulyarimma v. Thompson* (1999) 96 F.C.R. 153; 165 A.L.R. 621 [hereinafter *Nulyarimma* cited to A.L.R.]. The subject has been the interest in Canada, New Zealand and Australia in the Canadian *Royal Commission on Aboriginal Peoples 1996*; (RCAP, Report, 5 vols, Ottawa: CCGP, 1996); the *New Zealand Waitangi Tribunal Taranaki Report 1996*; and in Australia *Bringing Them Home Report 1996* (Human Rights and Equal Opportunity Commission, report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families, Canberra: AGPS, 1996). Havemann acknowledged that Australia, Canada & New Zealand have very different histories and

degree of curial deference is owed to these relationships becomes evident in that case analysis and in subsequent comparative reference to Canada.

Chapter three looks at the relationships of law to history. The paradox in this chapter is that the British rule of law has been both foe and friend. The tide of history has virtually washed away Aboriginal peoples, yet the rule of law now offers a mechanism of redress.⁶ An analysis of recent decisions such as *Commonwealth v. Yarmirr*⁷ [hereinafter *Yarmirr*] in the High Court and *Yorta Yorta v. Victoria*⁸ [hereinafter *Yorta Yorta*] and *Chapman v. Luminis Pty Ltd (No.5)*⁹ [hereinafter *Chapman*] in the Federal Court, illustrate the dangers of colonial relationships to history dictating what Aboriginal history and tradition is or should be since the assertion of Crown sovereignty. This highlights the significance of the Aboriginal perspective being placed before the Federal Court at hearings in the form of traditional oral evidence. This huge responsibility is depicted by comparative reference to Canada. That case analysis, in turn, evinces Aboriginal rights at risk of being frozen in time and the threatening demand for a timeless quality. Without regard to competing perspectives of history the High Court and Federal Court are at risk of applying fiction to fact, and if that fiction finds no traditional connection we see the tide of history further eroding what remains of Aboriginal people and their culture.

Chapter four discusses the status of relationships to land. Indigenous peoples see the land as owning them. Native title rights and interests find their origin in Aboriginal law and custom, which reflect a community connection with the land.¹⁰ The common law, on the

experiences of colonisation yet observed that the British rule of law was paramount in each colony.

⁶ On the British rule of law coming full circle from dispossession to the framing of indigenous claims within the rule of law see Harris, *supra* note 4 at 186-216. In Australia see *Thorpe v. Commonwealth [No. 3]* (1997) 144 A.L.R. 677; 71 A.L.J.R. 767 [cited to A.L.J.R.] at 775 per Kirby J., and *Nulyarimma, supra* note 5 at 638-639 per Merkel J.

⁷ (2001) 184 A.L.R. 113.

⁸ (2001) 110 F.C.R. 244; 180 A.L.R. 655 [cited to F.C.R.].

⁹ [2001] FCA 1106 (unreported).

¹⁰ *R. v. Toohey; Ex Parte Meneling Station Pty Ltd* (1982) 44 A.L.R. 63; 158 C.L.R. 327 [hereinafter *Meneling Station* cited to C.L.R.] at 357-358 per Brennan J.

other hand, has traditionally protected land ownership by individuals.¹¹ The law is at risk of undermining the spiritual connection to the land, by losing the Aboriginal perspective. This examination will involve looking at the central position of property in native title cases, especially English conceptions of real property. It will also involve examining the effect of these conceptions on the decisions emerging from the High Court and Federal Court. I will return to the most recent decisions of *Yarmirr*, and *Western Australia v. Ward*¹² [hereinafter *Ward*], and briefly consider the emerging theme of coexistence. Finally, I will examine a key component of coexistence, which has emerged over the years, that of legal pluralism. Chief Ted Moses of the Cree people in Eastern Canada identified the greatest challenge to the world community in this century to be the promotion of harmonious relations between peoples of disparate origins, histories, and languages residing in a single nation or State.¹³ It is a challenge to relationships between indigenous and non-indigenous people. It is about healing a relationship and building bridges between different perceptions of history, and language. Construction begins with dialogue between disparate stakeholders.¹⁴ Hints at legal pluralism emerge from the challenge spoken of by Chief Ted Moses.

Chapter five concludes that different relationships to history and land require attention in native title discourse. A multi disciplinary approach by the judiciary will ensure that the Aboriginal perspective equally informs the bench. The Aboriginal perspective is significant. A contextual approach to history and property demands recourse to traditional oral evidence and ensures the indigenous perspective is not lost. Without that perspective decisions are imbued with problems and erroneously articulate the Aboriginal relationship to land and history. The decisions to be made by the High Court, such as

¹¹ The common law respects and protects property rights. See s. 51(xxxi) of the *Constitution Act 1901* (Cth) and *Georgiadis v. Australian and Overseas Telecommunications Corporation* (1994) 179 C.L.R. 297.

¹² [2000] 99 F.C.R. 316; 170 A.L.R. 159 [cited to F.C.R.].

¹³ *The Globe and Mail*, Saturday 9 March 2002 at F7.

¹⁴ Paul Keating, as the Prime Minister of Australia in 1993 said in an address at Redfern, Australia that as an Australian nation “we have no need – nor any use – for guilt; [t]his generation cannot be held responsible for the cruelty of past generations.” That may be so, but we do have a responsibility to mend the wrongs of the past and to lay down the foundations for construction of a bridge between cultures. See P.J. Keating, “Prime Minister’s Address to the Nation, 15 November

Ward, and *Yorta Yorta*, are not unlike the *Van der Peet* trilogy in Canada, described by Kent McNeil as having a “profound impact on Aboriginal peoples, and will influence not only future judicial decisions but negotiations for the resolution of Aboriginal claims as well”.¹⁵

Therefore it is paramount that the High Court adopts a pluralistic approach to the competing perspectives. The High Court is now on trial. Members of the bench are beginning to question the underlying relationships of history and property. Yet they need to listen harder and carefully.

1993”, as reproduced in M. Goot & T. Rowse (eds), *Make a Better Offer: The Politics of Mabo* (Sydney, Pluto Press, 1994) at 236.

¹⁵ *R. v. Van der Peet* [1996] 2 S.C.R. 507; *R. v. NTC Smokehouse Ltd* [1996] 2 S.C.R. 672; and *R. v. Gladstone* [1996] 2 S.C.R. 723. See K. McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Native Law Centre, Canada: University of Saskatchewan, 2001) at 281.

Chapter Two

Methodology: Australian decisions & the appropriateness of comparative reference

2.1 The method

The High Court and the Federal Court are at the forefront of the intersecting of cultures. This thesis is a critique of the decisions since *Mabo [No.2]*, and proposes a shift in the discourse. I analyse Australian judicial pronouncements in native title cases and, less significantly, secondary cases with an indigenous component. From these cases one can begin to delineate the ingrained habits of thought about history and property underlying the decisions. Academic writing is invaluable, but it is the articulation of native title and indigenous interests by the High Court and Federal Court that is of primary concern. I investigate academic writing most closely where the High Court or Federal Court has sought to rely upon or adopt such writings. Valuable assistance can also be sought from Canadian jurisprudence for the reasons set out below.

2.2 Australian jurisprudence

Notwithstanding the directions issued by the British Government to the colonial governors to respect the rights of Aboriginal people, European settlers in Australia appropriated land with scarcely any regard for the local indigenous people. The attitude of the authorities was paternalistic, offering minimal handouts instead of recognising native title. This followed from the legal fiction that the land was unoccupied in 1788 when settlement began. The land was terra nullius and up for grabs.

The *Constitution Act 1901* (Cth)¹⁶ [hereinafter the Constitution] placed responsibility for the welfare of the indigenous population on the States, and that the central government would take care of those in the Northern Territory. The relevant section of the Constitution accordingly excluded Aboriginal people from that head of power, which authorised the Federal Parliament to make special laws for other races. In 1967 the

¹⁶ The *Constitution Act 1901* (U.K.), 64 & 64 Vict., c.12 is now the *Constitution Act 1901* (Cth).

Constitution was amended and the Parliament could henceforth make laws for Aboriginal people throughout Australia and not simply in the Northern Territory. Traditional rights to land were first considered in contemporary times in *Milirrpum v. Nabalco Pty Ltd.*¹⁷ Blackburn J. acknowledged the spiritual relationship of Aboriginal people to the land, but followed the prevailing view that as a consequence of the doctrine of tenure, on acquisition of sovereignty the Crown obtained beneficial ownership of land, unburdened by any native title. Blackburn J. while acknowledging it was a legal fiction was bound to accept that Australia was terra nullius. The next leap forward was the High Court's ruling in *Mabo [No.2]* that the terra nullius doctrine was not, and had never been, validly applicable. It was an act of courage for the High Court to reveal the doctrine as a fiction, despite a 200-year reign. In addressing the wrong of the dispossession of Aboriginal people the case set the parameters for the future recognition and subsequent protection of native title in Australia.

2.2.1 Common law recognition of native title

The following outline of cases is not comprehensive, but covers the most significant cases that are representative of the kinds of disputes and issues now coming before the Courts.

Recognition of native title by the common law commenced with *Mabo [No.2]* in 1992.¹⁸ It was a claim by the Meriam people for the Murray Islands, which lie in the Torres Strait. The total land area was 9 square kilometres. Effectively, six members of the High Court agreed that the common law recognised a form of native title and that Australia

¹⁷ (1971) 17 F.L.R. 141; [1972-73] A.L.R. 65 [hereinafter *Milirrpum* cited to F.L.R.].

¹⁸ Informally, native title jurisprudence commenced with the works of authors like Henry Reynolds. For example: H. Reynolds, *Dispossession, Black Australians and white invaders* (Sydney: Allen & Unwin, 1989); H. Reynolds, *Aboriginal Land Rights in colonial Australia* (Canberra: National Library of Australia, 1988); H. Reynolds, *Aborigines and settlers: the Australian experience 1788-1939* (Melbourne: Cassell, 1972); and H. Reynolds, *Frontier: Aborigines, settlers, and land* (Sydney: Allen & Unwin, 1987). Aboriginal people such as Eddie Mabo, and Vincent Langara were also dominant. See also W.E.H. Stanner's 1968 Boyer Lectures published as W.E.H. Boyer, *After the Dreaming* (Sydney: ABC Books, 1969). The Woodward Reports also provided a jurisprudential foundation to land rights and native title. Justice Woodward published two reports of the Aboriginal Land Rights Commission Report, 1973 and 1974 (Sydney: Aboriginal Land

was not, and never was, in fact terra nullius.¹⁹ It found by a majority 6:1 that (subject to certain exceptions) the Meriam people were entitled as against the whole world to possession, occupation, use and enjoyment of the lands in the Murray Islands.

It is necessary to understand the key principles from which that recognition of native title developed. To do this it is of assistance to refer to the decision of Brennan J. Recourse to his Honour's reasons is frequent in subsequent decisions and it is therefore important to extract the key passages that apply for the recognition of native title and Aboriginal customs, traditions, and practices. They were:

- native title has its origin in and is given its content by the traditional laws acknowledged by, and the traditional customs observed by the indigenous inhabitants of a territory;²⁰
- the nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs;²¹
- native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law;²²
- where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group remains in existence;²³ and

Rights Commission, 1973 and 1974). See also the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

¹⁹ Brennan J. wrote a scholarly judgment and Mason C.J. and McHugh J. agreed. Justices Deane and Gaudron combined to produce an equally significant joint judgment and Toohey J. also wrote an important judgment. Dawson J. dissented. The case has received extensive commentary. See for example: R. Bartlett, "Political and Legislative Responses to Mabo" (1993) 23 UWA Law Rev. 352; G. McIntyre, "Aboriginal Title: Equal Rights and Racial Discrimination" (1993) 16 UNSW L. J. 57; H. Reynolds, "The Mabo Judgment in the Light of Imperial Land Policy" (1993) 16 UNSW L. J. 27; and R. Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in Mabo" (1995) 17 Sydney Law Rev. 5. For a more recent conspectus of the development of the law and Aboriginal people see S. Strelein, "Conceptualising Native Title" (2001) 23 Sydney Law Rev. 95.

²⁰ *Mabo [No.2]*, *supra* note 1 at 58 per Brennan J; at 110 per Deane and Gaudron J.J; and at 195 per Toohey J.

²¹ *Ibid.* at 58 per Brennan J.

²² *Ibid.* at 59.

²³ *Ibid.* at 59-60.

- a native title, which confers a mere usufruct, may leave room for other persons to use the land either contemporaneously or from time to time.²⁴

The decision also confirmed that native title is subject to extinguishment, although it did not embark upon any formal analysis.²⁵

The difference in *Mabo [No.2]* between Deane and Gaudron J.J. on the one hand and Brennan J. on the other was really about fundamental notions of property. That is, how they viewed the content of native title, what it is, and whether it amounts to a proprietary right or merely a personal use.²⁶ For Deane and Gaudron J.J. the “personal rights” conferred by “common law native title” do not constitute “an estate or interest in the land itself.”²⁷ Even where native title may approach full ownership it remains subject to three limitations according to Deane and Gaudron J.J: it is inalienable; it does not constitute a legal or beneficial estate or interest in the actual land; it remains susceptible to extinguishment.²⁸

Comparatively, Brennan J. observed that if it was necessary to categorise an interest in land as proprietary in order that the interest survive a change in sovereignty, the interest possessed by an Aboriginal community that holds exclusive possession “falls into that category”.²⁹ For Brennan J., where a community asserts exclusive possession effectively it has an interest in the land that “must be proprietary in nature,” because there can be no other proprietor if exclusive possession is proved.³⁰ Inalienability of land by native titleholders was not relevant to Brennan J., because to apply those characteristics of alienability identified by Lord Wilberforce in *National Provincial Bank Ltd v.*

²⁴ *Ibid.* at 67.

²⁵ It is clear that native title may be extinguished by the valid exercise of the sovereign power to grant inconsistent interests in land to third parties: *Mabo [No.2]*, *supra* note 1 at 68-69, 89-90, 94, per Brennan J; at 110 per Deane and Gaudron J.J; and at 196-197 per Toohey J.

²⁶ See Hal. Wootten, “Mabo-Issues and Challenges” (1994) 1 TJR 303 at 341. Wootten claimed *Mabo [No.2]* established native title is a legal right to land, but the court nonetheless split on the issue of whether native title is proprietary.

²⁷ *Mabo [No.2]*, *supra* note 1 at 110 per Deane and Gaudron J.J.

²⁸ *Ibid.* at 88 per Deane and Gaudron J.J. See also *supra* note 25.

²⁹ *Ibid.* at 51 per Brennan J.

³⁰ *Ibid.*

*Ainsworth*³¹ [hereinafter *Ainsworth*] erroneously applies and imports definitions of property. His Honour was cautious not to import common law rules of property and properatarian ownership into the native title rights and interests that owe their existence to a source outside of and parallel to the common law. Therefore Brennan J. specifically rejected Lord Wilberforce in *Ainsworth*, which would deny indigenous people owned their land because the three characteristics were not present. Ownership of land within a given area in the exclusive possession of the native titleholders must be vested in the people. Land is "susceptible to ownership"³² and the fact that individual Aboriginal members of a community enjoy only usufructuary rights that are not proprietary in nature is not an impediment to the recognition of traditional proprietary community title for Brennan J.³³

Despite the division between members of the bench as to the proprietary or personal nature of native title, the essential characteristics outlined above resonate through every subsequent decision and are used as the corner stone for the enactment of the *Native Title Act 1993* (Cth) [hereinafter the NTA].

The NTA governs the recognition, protection, extinguishment, and impairment of native title.³⁴ Claims to title now proceed pursuant to the NTA.³⁵ The Federal Court of Australia is vested with the primary jurisdiction to hear and determine the claims.³⁶ On

³¹ (1965) A.C. 1175 at 1247-1248. Lord Wilberforce said that before an interest can be admitted into the category of property or of a right affecting property it must have the following characteristics: it must be definable; identifiable by third parties; capable in its nature of assumption by third parties and have some degree of permanence or stability.

³² *Mabo [No.2]*, *supra* note 1 at 51 per Brennan J.

³³ *Ibid.*

³⁴ See the objects of the NTA in s. 3(a).

³⁵ Claims in the Northern Territory can be pursued under the *Aboriginal Lands Right (Northern Territory) Act 1976* (Cth), but title is held in a different manner. Title to the land is proprietary and held in trust for Aboriginal people. On the relationship between native title and statutory titles granted under the *Land Rights Act* see *Pareroultja v. Tickner* (1993) 42 F.C.R. 32; 117 A.L.R. 206, a decision of the Federal Court on 20 September 1993. An application to the High Court for a grant of special leave to appeal against this decision was refused, but five of the seven judges expressly reserved the Court's position on the relationship between native title and statutory grants.

³⁶ The decision in *Brandy v. Human Rights And Equal Opportunity Commission and Ors* (1995) 183 C.L.R. 245; 127 A.L.R. 1 was a significant decision in the native title context in that the National Native Title Tribunal, (the NNTT) which was created by the NTA for the purposes of (amongst other things) determining native title claims brought by Aboriginal groups, had been constituted in

1 January 1994 the operative provisions of the NTA came into force. Yet 1 July 1993 was the date on and after which native title could be extinguished by the enactment of a law provided it satisfied the conditions prescribed under s. 11 of the NTA.

Following the *Mabo [No.2]* decision, the Federal Government enacted the NTA to process native title claims in Australia. Many of the comments found in the judgments, particularly those of Brennan J., are used in the NTA. For example s. 223, of crucial concern to this thesis, and more thoroughly investigated in chapter three, adopts the words used by Brennan J:

“Common law rights and interests

- (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
 - (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders;³⁷ and
 - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
 - (c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

- (2) Without limiting subsection (1), rights and interests in that subsection includes hunting, gathering, or fishing rights and interests.”³⁸

the same manner as the Human Rights and Equal Opportunity Commission, contrary to the Constitution, which prevents judicial power being conferred on a body (the NNTT) that is not a properly constituted court. The amendment of the NTA in 1998 provided for native title claims to be made to and determined by the Federal Court. The NNTT still exists, but now maintains only mediation and administrative functions with respect to the native title claim process.

³⁷ These are the words of Brennan J. in *Mabo [No.2]*, *supra* note 1 at 58. See also at 110 per Deane and Gaudron J.J; and at 195 per Toohey J.

³⁸ It would appear that this is not an exhaustive list.

Section 223, in particular subparagraph (1) has emerged as a difficult provision for some members of the bench. Following enactment of the NTA in 1994, the State of Western Australia challenged its application to Western Australia. *Western Australia v. Commonwealth*³⁹ [hereinafter the *Native Title Act Case*] concerned a constitutional issue between the State of Western Australia and the Commonwealth in regard to the validity of the NTA and the State's ability to enact its own legislation. The High Court in a unanimous judgment found that the NTA was a valid law of the Commonwealth under s. 51(xxvi) of the Constitution.⁴⁰ The decision was essentially argued on constitutional grounds, and perhaps because the issues of extinguishment and pre conceptions of property were not underlying issues in the case the members of the Court found considerable common ground. The majority confirmed native title is determined on a case-by-case basis;⁴¹ that it can be extinguished by the valid exercise of the sovereign power to grant inconsistent interests in land to third parties;⁴² and that native title has a precarious character.⁴³ The majority succinctly described these three characteristics of native title in the following paragraph:

“The content of native title is ascertained by reference to the laws and customs of the people who possess that title, but their enjoyment of the title is precarious under the common law: it is defeasible by legislation or by the exercise of the Crown's (or a statutory authority's) power to grant inconsistent interests in the land or to appropriate the land and use it inconsistently with enjoyment of the native title.”⁴⁴

³⁹ (1995) 183 C.L.R. 373; 128 A.L.R. 1 [cited to C.L.R.] The case is known as the *Native Title Act Case*.

⁴⁰ It was a 6:1 decision. Dawson J. dissented.

⁴¹ *Ibid.* at 452 per Mason C.J., Brennan, Deane, Toohey, Gaudron, and McHugh J.J. This was reconfirmed in *Wik Peoples v. State of Queensland* (1996) 187 C.L.R. 1; 141 A.L.R. 129 [cited to C.L.R.] at 169 per Gummow J.

⁴² *Ibid.* at 439.

⁴³ *Ibid.* at 439, 452-453.

⁴⁴ *Ibid.* at 452-453.

One of the important factors to emerge from that decision is the fact that the High Court described or characterized native title, or enjoyment thereof, as precarious because it is subject to extinguishment. The NTA provides statutory protection for native titleholders against any extinguishment of native title subject to the specific and detailed exceptions, which that Act, prescribes.⁴⁵ The *Racial Discrimination Act 1975* (Cth) protects native titleholders against discriminatory extinguishment of native title so that the holders of native title are able to enjoy their title equally with the enjoyment of other title by the holders thereof.⁴⁶

2.2.2 *The ten years since Mabo [No.2] (1992 – 2002)*

The NTA, in particular s. 223, and the decision of the High Court in *Mabo [No.2]* set the indicia for the recognition of native title rights and interests in Australia. Despite initial recognition, both the High Court's *Mabo [No.2]* decision and the NTA left many key questions about the nature of native title and its relationship with or to other forms of interest in land unanswered. Some have been resolved, but others await clarification. The *Native Title Act Case* is also important because it saw the emergence of the precarious character of native title. Precariousness is morphed into fragility by the High Court in subsequent decisions. That fragility becomes significant in the recognition and protection afforded to native title rights and interests. At the point of intersection between the native title interest and the common law interest the fragile interest is defeated. That is, extinguishment occurs.

Extinguishment of native title was analysed in *North Ganalanja Aboriginal Corporation & Anor for and behalf of the Waanyi People v. State of Queensland & Ors*⁴⁷ [hereinafter the *Waanyi Case*]. It concerned an application under the NTA for a determination of

⁴⁵ *Ibid.* at 453.

⁴⁶ Section 10(1) of the *Racial Discrimination Act 1975* (Cth) provides: "persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin." See *Native Title Act Case*, *supra* note 39 at 453.

native title to a parcel of land in northwest Queensland. A camping and water-reserve established by proclamation and known locally as the “Ten-Mile Water Hole” was the subject of the claim. Two companies, Century Zinc Limited and CRA Corporation, asserted that native title had been extinguished over the claimed land by reason of the grant of two pastoral leases. Although the case was primarily concerned with the procedure adopted by the President of the National Native Title Tribunal [hereinafter the NNTT] it saw for the first time the pressing question of extinguishment of native title over pastoral leases.⁴⁸ The High Court refused to hear the issue of extinguishment in respect to pastoral leases; although Kirby J. was quite unconvinced the opportunity should pass.⁴⁹ One particular comment of the decision was significant. The High Court observed that unless the NTA is read with “an understanding of the novel legal and administrative problems involved in the statutory recognition of native title, its terms may be misconstrued”.⁵⁰

The decision in *Wik Peoples v. State of Queensland & Ors*⁵¹ [hereinafter *Wik*] followed on 23 December 1996. The Wik Peoples and Thayorre Peoples claimed certain areas of land in Queensland and those areas included two pastoral leases, which had been granted pursuant to statute.⁵² Again the question arose as to whether pastoral leases issued under Queensland legislation extinguished native title. The High Court had to consider the effect of rights conferred by State law on native title rights.

The division in the Court was acute and it split 4 to 3. There are three significant points

⁴⁷ (1996) 185 C.L.R. 595; 135 A.L.R. 225 [cited to C.L.R.]. The case is known as the *Waanyi Case*.
⁴⁸ Much of Australia has been the subject of pastoral leases. A pastoral lease appears to be unique to Australia. It was a grant by the Crown, pursuant to statute, of an enormous area of land for “agricultural” or “pastoral” purposes. Many still remain. The difficulty in Australian native title determinations is often the area claimed has historically been the subject of pastoral leases. Accordingly, the pastoral lease question was of primary concern to many parties. It also raised subsidiary issues of revival or suspension of native title, and partial extinguishment.

⁴⁹ *Waanyi Case*, *supra* note 47 at 662 per Kirby J.

⁵⁰ *Ibid.* at 614-615 per Brennan C.J., Dawson, Toohey, Gaudron and Gummow J.J.

⁵¹ (1996) 187 C.L.R. 1; 141 A.L.R. 129 [cited to C.L.R.].

⁵² There were two pastoral leases. The first Mitchellton lease, issued under the *Land Act 1910* (Q) in 1915, was forfeited for non-payment of rent in 1918. The second lease, issued under the 1910 Act in 1919, was surrendered in 1921. The lessees under either lease did not take possession. Since 12 January 1922 the land has been reserved for the benefit of Aborigines or held for and on their

to be extracted. Firstly, the idea of diversity in the content of native title emerged. There are different forms of native title, so that Australian Aboriginal rights and interests exist along a spectrum.⁵³ Native title may be classified as personal or communal usufructuary rights involving access to an area of land to hunt for or gather food, or to perform traditional ceremonies. At the other end of that spectrum a degree of attachment to the land may be such as to “approximate that which would flow from a legal or equitable estate therein”.⁵⁴

The second point from the decision emerges from the division amongst members of the bench. That division arose around the applicable property law principles. Toohey, Gaudron, Gummow and Kirby J.J., in separate judgments each held that, as the leases did not confer rights of exclusive possession of the areas the grants did not necessarily extinguish all incidents of native title. The leases were statutory, and therefore distinguished from the common law lease where exclusive possession is a determining characteristic.⁵⁵ The statutory leases were unique, not creatures of the common law and therefore not necessarily characterised by exclusive possession. They were unique because they covered immense areas of land over which exclusive possession could not have practically been intended. The minority, comprising Brennan C.J., Dawson, and McHugh J.J. held the leases granted exclusive possession. Hence the case turned on the difference between common law and statutory leases and whether the possessory rights granted were exclusive or not.

Kirby J. observed that the ordinary common law principles for the protection of a proprietary right, found to have survived British settlement, extended to the protection of the indigenous peoples of Australia in exactly the same way as the law would protect other Australians.⁵⁶ Brennan C.J., (in dissent on the nature of a pastoral lease) observed that native title rights and interests, although ascertained by reference to traditional laws

⁵³ behalf. The first Holroyd lease, issued under the 1910 Act in 1945, was surrendered in 1973. The
⁵⁴ second lease, issued under the *Land Act 1962* (Q), was for a term of 30 years from 1 January 1974.
⁵⁵ *Wik*, *supra* note 51 at 169 per Gummow J.

⁵⁴ *Ibid.*

⁵⁵ See *Radaich v. Smith* [1959] 101 C.L.R. 209 at 222; and also *Street v. Mountford* [1985] A.C. 809 at 827.

and customs, are recognised at common law and can be enforced at common law. It is therefore erroneous to assert that native title, at the end of the spectrum where a degree of attachment to the land may be such as to approximate that which would flow from a legal or equitable estate therein is not a proprietary interest.

The High Court reiterated its earlier comments in *Mabo [No.2]*, and the *Native Title Act Case*, that native title will be determined on a case-by-case basis, and will be found to have been extinguished where it is inconsistent with the statutory rights granted.⁵⁷ It is determined on a case-by-case basis not only because of tradition and custom, but also because native title is inherently fragile. It is suspect to extinguishment in certain circumstances. Although in dissent on the ultimate issue of the case Chief Justice Brennan articulated the three instances in which native title is liable to extinguishment by laws enacted by, or with the authority of, the legislature or by the act of the executive in exercise of powers conferred upon it.⁵⁸ Those three instances were:

- laws or acts which simply extinguish native title;
- laws or acts which create rights in third parties (in respect of a parcel of land subject to native title) which are inconsistent with the continued right to enjoy native title; and
- laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title.

The third point, and perhaps the most significant, is that the decision indirectly acknowledges, and Gummow J. directly accepts the proposition, that interests in property that are unknown to the common law can be created.⁵⁹ Pastoral leases are a prime example. Statute can create proprietary interests – pastoral leases. This is significant because it shows the common law can recognise and protect interests in land that have

⁵⁶ *Wik*, *supra* note 51 at 251 per Kirby J.

⁵⁷ *Ibid.* at 169 per Gummow J. See also *Mabo [No.2]*, *supra* note 1 at 58, 61 per Brennan J; and *Native Title Act Case*, *supra* note 39 at 452.

⁵⁸ *Ibid.* at 84-85 per Brennan J.

⁵⁹ *Ibid.* at 174 per Gummow J. See also *Sevenoaks, Maidstone & Turnbridge Railway Co. v. London Chatham & Dover Railway Co* (1879) 11 Ch D 625 at 635; and *Duncan v. State of Queensland* (1916) 22 C.L.R. 556 at 578. Both are cited by Gummow J. See also *Davies v. Littlejohn* (1923) 34 C.L.R. 174.

their origin outside the common law. Native title is also an interest that arises outside of the common law.

The similar New South Wales case of *Anderson v. Wilson & Or*⁶⁰ [hereinafter *Anderson*] saw the direct application of the principles in *Wik* to a lease in perpetuity in New South Wales. The matter was heard by the High Court in September 2001 and awaits judgment. The critical question in *Anderson* was not whether, as an abstract proposition, the lease of Wilson conferred exclusive possession, but whether the rights conferred upon him as lessee were inconsistent with any or all of the native title rights and interests.⁶¹

The issues arising in *Wik* and *Anderson* highlight the difficulties that imbue the recognition and protection of native title. Native title is separate from the common law, yet it can be recognised by the common law and is recognised under the NTA. When a common law interest and native title rights or interests arise in the same piece of land, that is intersect, the interaction (at the point of intersection) determines the existence or extinguishment of the native title rights and interests. This is most clearly demonstrated when considering native title interests and the grant of a fee simple estate in land.

In 1998, the Larrakia people claimed an area of land and water around Darwin and the Cox Peninsula in the Northern Territory. The proceedings in *Fejo v. Northern Territory*⁶² [hereinafter *Fejo*] raised two questions of importance for native title claims in Australia: does a grant of fee simple extinguish native title, and could native title revive when alienated land is once again held by the Crown? It indirectly placed before the High Court the very tenure system upon which proprietary interests in Australia are recorded and protected – the Torrens system.

For the first time the Court produced a unanimous majority judgment. The Court held

⁶⁰ (2000) 97 F.C.R. 453; 171 A.L.R. 705.

⁶¹ For an historical survey of pastoral leases in Australia see the excellent monograph H. Reynolds, & Dalziel, *Aborigines, Pastoral Leases and Promises by the Crown – Imperial and Colonial Policy 1826-1855*. Also published as “Aborigines and Pastoral Leases – Imperial and Colonial Policy 1826-1855” (1996) 19 UNSW Law Journal 315.

⁶² (1998) 195 C.L.R. 96; 156 A.L.R. 721 [cited to A.L.R.].

that a grant of fee simple extinguishes native title because of the effect the grant has on the rights that together constitute native title.⁶³ The common law proprietary concept of fee simple is wholly inconsistent with native title. The grant of freehold was inconsistent with all of the native title rights and interests over the subject land, because the holder of the fee simple could exclude anyone from access to the land, and could use it in any manner. On the second question the majority held native title to land was not, and could not be revived when the land came to be held again, (as it was in this case) by the Crown.⁶⁴ The argument for revival failed because the rights were extinguished by the prior grant of freehold title, not merely suspended.

The significance of the decision is threefold. Firstly, the majority held that native title is neither an institution of the common law nor a form of common law tenure. Nonetheless it is recognised by the common law.⁶⁵ This resonates with the observations of the High Court in *Mabo [No.2]*, that the source of native title is the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.⁶⁶ The majority then pointed out that there is therefore “an intersection of traditional laws and customs with the common law.”⁶⁷ From that intersection the two questions of extinguishment and revival arose.

A further point to be extracted from the decision is the recurrence of the fragile characteristic of native title. The preceding decisions suggested a fractured legal pluralism where two sets of interests emerged from disparate sources. The decisions required adjudication at the point of intersection. Yet the interaction, revealed from the decisions, exposed what the Court characterised as a fragile interest. That is, native title is subject to extinguishment. Kirby J. in a separate decision in *Fejo*, specifically referred

⁶³ *Ibid.* at 737 per Gleeson C.J., Gaudron, McHugh, Gummow, Hayne and Callinan J.J. The decision on this question picks up obiter comments that a fee simple interest extinguishes native title in *Mabo [No 2]*, *supra* note 1 at 69 per Brennan J; at 110 per Deane and Gaudron J.J; *Native Title Act Case*, *supra* note 39 at 439 per Mason C.J., Brennan, Deane, Toohey, Gaudron and McHugh J.J; and *Wik*, *supra* note 51 at 84-85 per Brennan C.J.

⁶⁴ *Ibid.* at 740.

⁶⁵ *Ibid.* at 737.

⁶⁶ *Mabo [No.2]*, *supra* note 1 at 58 per Brennan J; at 110 per Deane and Gaudron J.J; and at 195 per Toohey J.

⁶⁷ *Fejo*, *supra* note 62 at 737.

to the “inherently fragile” native title right that is “susceptible to extinguishment or defeasance”.⁶⁸

In *Yanner v. Eaton*⁶⁹ [hereinafter *Yanner*] the High Court addressed for the first time a right to hunt wild animals and the application of State legislation.⁷⁰ Yanner was a member of the Gunnamulla clan of the Gangalidda tribe.⁷¹ Between October and December 1994 Yanner used a traditional form of harpoon to catch two juvenile estuarine crocodiles in Cliffdale Creek in the Gulf of Carpentaria in Queensland. Some of the meat was consumed, some frozen and the skins retained at his home. At the time of the offence the *Fauna Conservation Act 1974* (Q) [hereinafter the *Fauna Act*] provided in s. 54(1)(a) that “a person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act”.⁷² Yanner was subsequently charged in the Magistrates Court of Queensland with one count of taking fauna contrary to the *Fauna Act*. The Magistrate found that Yanner’s clan had a connection with the area of land from which the crocodiles were taken and that the connection existed prior to the common law taking effect in the colony of Queensland in 1823 and dismissed the charge.

In *Yanner*, it was argued that the Magistrate was correct in dismissing the charge because in taking the crocodiles the appellant was exercising or enjoying his native title rights and interests; these rights and interests were preserved by the NTA and therefore the *Fauna Act* was invalid to the extent to which it prohibited or regulated the taking of crocodiles in the exercise of those rights for the purpose of satisfying personal, domestic or non-commercial communal needs.⁷³ The respondent argued that a provision of the *Fauna Act* vested property of fauna in the Crown and therefore had extinguished the right prior to

⁶⁸ *Ibid.* at 756 per Kirby J.

⁶⁹ (1999) 201 C.L.R. 351; (1999) 166 A.L.R. 258 [cited to A.L.R.]. The exercise of traditional rights first arose in *Wilkes v. Johnsen* (1999) 21 W.A.R. 269; 151 F.L.R. 89 a decision of the Full Court of the Supreme Court of Western Australia on 23 June 1999. The defendant was in possession of undersized marron fish contrary to the *Fish Resources Management Act 1994* (WA).

⁷⁰ *Fauna Conservation Act 1974* (Q).

⁷¹ The name of the tribe is sometimes spelled “Gungaletta”.

⁷² The *Fauna Conservation Act 1974* (Q) was repealed and replaced by the *Nature Conservation Act 1992* (Q) which commenced on 19 December 1994.

⁷³ See s. 109 of the *Constitution Act 1901* (Cth).

the NTA.⁷⁴ In construing the word “property” as used in the *Fauna Act*, the majority looked to the purpose of the legislation as a whole and the intention of Parliament. In their view, the vesting of property in the Crown under that Act was for the purposes of resource management and revenue collection; it did not confer full beneficial ownership of fauna on the Crown.

The case flirted with issues of partial extinguishment and other issues pressing in native title jurisprudence, but the High Court found it neither necessary nor desirable to express any view about them when the case could be decided on the narrow question of the construction of the *Fauna Act*.⁷⁵ The High Court held the *Fauna Act* did not extinguish the rights and interests, which Yanner relied upon and the Magistrate was right in dismissing the charge.

This was the first case since *Mabo [No.2]* that directly addressed competing perspectives of history and land. Yanner’s traditional native title right to hunt was in issue, and although the contemporary method of hunting was not formally challenged the decision provides the first comments of the High Court on placing a contemporary spin on traditional practices, customs and rights. Although the decision rested on the construction of a particular provision of the *Fauna Act*, the framework of the majority judgment was constructed on relationships to property.

The circumstances giving rise to the extinguishment of native title were discussed in each of the several land mark High Court decisions, notably *Mabo [No. 2]*, the *Native Title Act Case*, *Wik*, *Fejo*, and *Yanner*. It follows from those decisions that extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established. If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under or by other interests, native title rights and interests must yield, to the extent of the inconsistency.

⁷⁴ Section 7(1) provided “All fauna, save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority.”

⁷⁵ *Yanner, supra* note 69 at 270 per Gleeson C.J., Gaudron, Kirby and Hayne J.J.

Working within the parameters set by the NTA and these decisions of the High Court, the Federal Court has been besieged with native title applications. The decision in *Ward* confronted the unresolved issues directly. In *Ward* the Federal Court was confronted with an enormous case, which involved five appeals and a cross-appeal against the first determination of native title in Western Australia.⁷⁶ The case required a consideration of the true nature of native title and the manner of extinguishment.

The claim covered an area of land and waters in the northeast of Western Australia, known as the East Kimberley District, and adjoining land in the Northern Territory. The total claim area was approximately 7,900 square kilometres.⁷⁷ What began with *Mabo [No.2]*, a claim to 9 square kilometres had grown a thousand fold. The claim area included vacant Crown land and Crown land that had been leased or reserved for various purposes, including conservation, preservation of Aboriginal art, mining and the Keep River National Park. A great deal of the claim area had earlier been the subject of pastoral leases. The volume of historical interests and the number of stakeholders were of a magnitude not previously seen by the Courts.

In the Federal Court both the majority and the dissenting judges upheld the trial judge's findings of fact in relation to the connection of the Miriwung and Gajerrong community with the land claimed, and their connection with the Aboriginal people in occupation of the claim area at the time of sovereignty. The other major issue was whether or not native title had been extinguished. It was at this point the Full Court divided.

The majority, Beaumont and von Doussa J.J., found that the principles by which the trial judge determined whether extinguishment had occurred departed from the test approved by the High Court in *Wik*, and *Fejo*. In particular they found that the trial judge strayed

⁷⁶ The application for a determination of native title was heard by Lee J., and the decision is reported at *Ward v. Western Australia* (1998) 159 A.L.R. 483. The determination was made on 24 November 1998 in favour of the Miriwung and Gajerrong people.

⁷⁷ The claim area included part of the township of Kununurra, Lake Argyle and Lake Kununurra, part of the Ord River irrigation area and the Argyle Diamond Mine. The commercial stakeholders

by adopting the Canadian adverse dominion approach to extinguishment. The test of adverse dominion has three components: a clear and plain expression of intention by the legislature to extinguish native title; an act authorized by the legislature which brings about permanent adverse dominion; and actual use of the land which is permanently inconsistent with the continuance of native title and does not merely suspend it. Beaumont and von Doussa J.J. preferred to characterize native title as a bundle of rights in contrast to the Canadian position in *Delgamuukw v. British Columbia*⁷⁸ [hereinafter *Delgamuukw*], which characterized it as a right to land. Secondly, the majority found that it was possible for some of the “bundle of rights” which together makes up native title to be extinguished. Where this happened partial extinguishment occurred. The concept of partial extinguishment had to this point not been authoritatively determined by the High Court and nor had a Full Court of the Federal Court considered it.

North J. in dissent preferred an analysis that native title was not a bundle of rights but a fundamental right to land. Accordingly, he found that there could be no partial extinguishment of native title. Rather extinguishment could only occur where there was a total and permanent inconsistency between native title and the rights granted. Furthermore, North J. found that in the event that a lesser degree of inconsistency occurred native title was only temporarily suspended or impaired.

The point of divergence in the Federal Court is clearly linked to relationships to land. How the relationship of Aboriginal people to land is articulated will ultimately determine the extinguishment question. The fact is that the concept of extinguishment cannot be clarified until the notion of native title is comprehensively defined. The possibility of extinguishment is dependent upon the rights or interests established. If native title is in fact a “bundle of rights” the notion of partial extinguishment may be applicable. If in fact native title amounts to an interest in land (in the sense it is not a bundle of rights) concepts of partial extinguishment can have no logical legal foundation. In the result the appeals failed on the “connection” issues, and by a majority, (Beaumont and von

were present, State and Territory governments had an interest, as did other Aboriginal groups because the outcome of the decision would vibrate into native title jurisprudence.

Doussa J.J.) the appeals were allowed in part on the extinguishment issues. Justice North dissenting would have dismissed the appeals. The case was appealed to the High Court and heard in March 2001. The decision is pending.

In September 2001, prior to the release of the next major High Court decision, but following the judgment of the Full Court of the Federal Court in *Ward*, the Full Court of the Federal Court was again required to rule on the nature of native title and extinguishment in *Yorta Yorta*. In that case eight applicants on behalf of the Yorta Yorta Aboriginal Community made an application under the NTA for a determination that native title existed over 2,000 square kilometres of land and waters in northern Victoria and southern New South Wales. The area claimed included public land, a 42,000-hectare ochre mine situated on a grazing permit (Moirra Station) and encompassed parts of the River Murray water system. That water system feeds New South Wales, the State of Victoria and South Australia. The judgments in *Mabo [No.2]* speak only of the rights and interests of indigenous peoples in their lands; there is no reference to rights and interests in water. Yet the NTA has application in relation to native title rights and interests in both land and waters. Section 253 defines “land” to include the airspace over, or sub soil under land but does not include “waters”; whereas “waters” is defined to include, inter alia, a river, a lake or subterranean waters or the bed or sub soil under, or airspace over any waters. The definition also extends to offshore waters. *Yorta Yorta* had no offshore component, but the claim did have a very substantial connection with the Murray and Goulburn Rivers and other rivers and watercourses in Victoria and New South Wales. After a lengthy hearing, the trial judge rejected the application and made a determination that native title did not exist over the areas claimed, because the claimants failed to show a traditional connection with the claimed land. The trial judge found a vacuum in the evidence presented in that the traditional connection had not been maintained. The Yorta Yorta peoples’ native title was extinguished because the tide of history had washed it away. On the evidence, the trial judge found that the claimants had not proven that their contemporary activities on the land claimed were based on their traditional laws and customs and that there had been no real acknowledgment of

traditional laws or observance of traditional customs since 1874. The applicants appealed arguing the trial judge erroneously adopted a “frozen in time” approach to the evidence which led to a failure to give sufficient recognition to the capacity of traditional laws and customs to adapt to changed circumstances, and secondly, failed to take into account significant and important traditional oral evidence in relation to the current practices and beliefs. The Full Court again split on the appropriate approach under the NTA for the recognition and protection of native title rights and interests. The majority (Branson and Katz J.J.) dismissed the appeal, concluding that it was open to the trial judge to find there was a period of time between 1788 and the date of the appellant’s claim during which the relevant community lost its character as a traditional community.

A recurring theme of earlier cases was at the forefront of this case. The requirement of connection and abandonment and cessation of tradition because of lack of verification in the historical records directly confronted the Court.⁷⁹ The subsidiary issue, pejoratively tied to the requirement of connection was the freezing of practices, traditions and customs at the time of assertion of sovereignty. It emerged indirectly in *Ward*, but confronted the Full Court of the Federal Court directly here. Both these issues will be addressed in chapter three. The decision of the Full Court was appealed to the High Court and special leave was granted in December 2001. The High Court heard the matter on 23 and 24 May 2002 and reserved its decision.

The most recent case to emerge from the High Court of Australia on the recognition and protection of native title is that of *Yarmirr* in October 2001. The decision of the High Court is the first in a trilogy of significant decisions. *Ward*, and *Yorta Yorta*, will complete that trilogy. The determination in *Yarmirr*, was made under the NTA as it stood before the amendments made by the *Native Title Amendment Act 1998* (Cth) came into force. The proceedings raised several important questions, including whether native

⁷⁹ Mr. Young counsel for the appellants in the special leave application asserted questions of abandonment and cessation because of the lack of verification in the historical records is going to be a recurring theme in many of the cases awaiting adjudication. See Application for Special Leave to Appeal to the High Court *Members of the Yorta Yorta Aboriginal Community v. State of Victoria & Ors.* M19/2001, 14 December 2001 [hereinafter *Yorta Yorta* special leave transcript] at 16.

title may be recognised, and protected, in relation to Australia's coastal seas, and if so, the extent of such recognition and protection. It was an appeal from the Full Court of the Federal Court decision (Beaumont and von Doussa J.J.) and involved an application for determination of native title to seas and the seabed and sub soil. It also involved the question of whether public rights to fish and navigate and the international right of innocent passage in territorial seas were inconsistent with exclusive native title rights.

Mary Yarmirr and the Yurrmurwu people claimed exclusive possession of an area of land on behalf of a number of clan groups.⁸⁰ The area included the seas and seabeds contained within the Croker Island area of the Northern Territory and extended to any land or reefs contained within an identified boundary.⁸¹ Within that claim area are a number of commercial and other interests. For example, the Northern Territory Government claimed to be a stakeholder, as did the Federal Government on the basis that Australia's territorial sea extended from the low-water mark to 12 nautical miles.⁸² Issues also arose in respect of public rights to fish and navigate and the international right of innocent passage in territorial seas. For example, a shipping company could have asserted an international right of passage through the claimed waters and a fisherman could arguably assert a public right to fish with its origins in the Magna Carta.

The trial judge held native title existed in relation to the claimed sea and seabed, but found that native title rights and interests did not confer "exclusive possession, occupation, use and enjoyment" of the sea and seabed to the exclusion of all others. Both the claimants and the Commonwealth appealed to the Full Court and then to the High Court.

Five of the seven members of the bench rejected the Federal Government's appeal against the Full Court of the Federal Court's decision that found Aboriginal peoples in

⁸⁰ The Mandilarri-Ildugij, Mangalarra, Muran, Gadurra, Minaga, Ngayndjagar and Mayorram peoples.

⁸¹ Croker Island is approximately 250 kilometres north east of Darwin.

⁸² In 1990 Australia legislated to extend the territorial sea from the low-water mark to 12 nautical miles to sea. It originally extended to 3 nautical miles to sea.

the Croker Island area had native title rights over the seabed and sea.⁸³ At the risk of over simplification, the Commonwealth claimed native title could not exist in the sea because the common law had a territorial limit, and native title could not be recognised by the common law beyond that territorial limit. The High Court rejected that radical claim by a six to one decision. The High Court recognised restricted native title rights over the sea. That is it did not find on the evidence that native title rights and interests were exclusive. All but Kirby J. rejected the traditional owners bid seeking exclusive rights over the area.⁸⁴ Although the decision held that none of the past or present law relating to the territorial sea is inconsistent with the common law of Australia recognising native title rights and interests in relation to the sea or the seabed in the area it was only a partial victory for the Northern Territory's Yuwurrumu people.⁸⁵ Dismissing the appeals the majority found that non-exclusive native title rights could be recognised offshore; and the common law could not recognise exclusive native title offshore because this would be inconsistent with both public rights to fish and navigate found under the common law and the right of innocent passage under international law.⁸⁶

The significance of this decision is twofold. First, the Yuwurrumu were able to extend the concept of native title to include tidal waters.⁸⁷ Second, what we see is that it is possible that a number of different and independent interests can be asserted simultaneously in respect of the same piece of land, resource and now waters. It raises the possibility of potential international stakeholders as well as domestic in that title was

⁸³ The majority comprised Gleeson C.J., Gaudron, Gummow and Hayne J.J. Kirby J. wrote a separate judgment, dissenting in part, and McHugh and Callinan J.J. dissented.

⁸⁴ Kirby J. would have granted exclusive rights over the area to the claimants, which would have allowed them first rights over fishing, hunting and other resources.

⁸⁵ Left undetermined by the High Court was how the native titleholders could access the area claimed to protect and safeguard knowledge. The High Court specifically said it would not deal with that issue. See *Yarmirr*, *supra* note 7 at 118.

⁸⁶ See the second Aboriginal Land Rights Commission Report by Justice Woodward, *supra* note 18 which raised the possibility that Aboriginal landowners might be allowed to licence commercial fishers to use their waters.

⁸⁷ At the time of hearing before the High Court there were an estimated 190 claims with an offshore component awaiting the outcome and wisdom espoused by the High Court.

being sought over the seas outside Australia's territorial limit.⁸⁸

2.2.3 *The rubric of native title*

After this lengthy review it is desirable to summarise the main principles for the recognition and protection of native title. Three observations of the rubric of native title as espoused by the Courts over the past ten years can be made.

First the Court has attempted to articulate the content and characteristics of native title. When the decision in *Mabo [No.2]* was handed down the law regarding native title was in its infancy, so to look to *Mabo [No.2]* for a particular answer is necessarily fraught with danger. Yet *Mabo [No.2]* is undoubtedly the most significant case on what amounts to common law native title. The essential characteristics emerging from the decisions since *Mabo [No.2]* are that: (i) native title is to be determined on a case-by-case basis because the content of native title, its nature and incidents will vary from one case to another;⁸⁹ (ii) native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Aboriginal people in question;⁹⁰ (iii) native title is recognised by the common law, but is not an institution of the common law;⁹¹ (iv) it is not alienable by the common law;⁹² (v) determination is a

⁸⁸ The decision at first instance is *Yarmirr v. Northern Territory [No.2]* (1998) 82 F.C.R. 533 and on appeal before the Full Court of the Federal Court: *Commonwealth of Australia v. Yarmirr* (1999) 101 F.C.R. 171; 168 A.L.R. 426 [cited to F.C.R.]. Note that the decision in *Yarmirr* required the High Court to consider the written reasons of Beaumont and von Doussa J.J. on the one hand and Merkel J. on the other. Again the matter of *Ward*, *supra* note 12 requires the High Court to review the reasons of Beaumont and von Doussa J.J. Similarly in many other significant cases before the Federal Court concerned with Aboriginal interests von Doussa J. and Merkel J. have been the presiding judges. These particular justices are having a huge impact on the direction of the Court. See *Chapman*, *supra* note 9; *Bulun Bulun v. R & T Textiles Pty Ltd* (1998) 86 F.C.R. 244; 157 A.L.R. 193 [hereinafter *Bulun Bulun* cited to F.C.R.]; and *Nulyarimma*, *supra* note 5.

⁸⁹ *Mabo [No.2]*, *supra* note 1 at 58, 61 per Brennan J; *Native Title Act Case*, *supra* note 39 at 452; *Wik*, *supra* note 51 at 169.

⁹⁰ *Mabo [No.2]*, *supra* note 1 at 58 per Brennan J; at 110 per Deane and Gaudron J.J.; at 195 per Toohey J; and recounted in *Wik*, *supra* note 51 at 84-85 per Brennan C.J.; *Fejo*, *supra* note 62 at 737; and at 756 per Kirby J; *Yanner*, *supra* note 69 at 268-269 per majority; at 278 per Gummow J; *Yarmirr*, *supra* note 7 at 120, 122 per majority and at 212 per Kirby J. See also s. 223(1)(a) of the NTA.

⁹¹ *Mabo [No.2]*, *supra* note 1 at 59 per Brennan J; *Fejo*, *supra* note 62 at 737 per Gleeson C.J., McHugh, Gummow, Hayne and Callinan J.J.

⁹² *Mabo [No.2]*, *supra* note 1 at 60 per Brennan J.

question of fact, ascertained by evidence⁹³ (evidence of traditional laws acknowledged and traditional customs observed);⁹⁴ (vi) native title exists on a spectrum;⁹⁵ (vii) native title is “inherently” fragile: it has been recognised as such by both the High Court and by international conventions;⁹⁶ and (viii) native title extends or is recognised by the common law to exist in land and waters, and the sea and seabed.⁹⁷

The second observation is that native title can be extinguished. The concept of extinguishment is yet to be authoritatively determined by the High Court, but some essential factors have already been elucidated.⁹⁸ In Australia, extinguishment (i) is a question of law;⁹⁹ (ii) must be clearly established;¹⁰⁰ (iii) turns on legal criterion of inconsistency;¹⁰¹ (iv) is final and cannot be suspended;¹⁰² (v) is not achieved by mere

⁹³ *Ibid.* at 58 per Brennan J. See also *Native Title Act Case*, *supra* note 39 at 452; *Wik*, *supra* note 51 at 169 per Gummow J; *Ward*, *supra* note 12 at 338, 365 per von Doussa and Beaumont J.J.

⁹⁴ *Mabo [No.2]*, *supra* note 1 at 58 per Brennan J; at 110 per Deane and Gaudron J.J; and at 195 per Toohey J.

⁹⁵ *Meneling Station*, *supra* note 10 at 358 per Brennan J. It was observed that other Aboriginal people or groups may have a “spiritual responsibility” for the same land or may be entitled to exercise some usufructuary right with respect to it. See also *Mabo [No.2]*, *supra* note 1 at 57 per Brennan J; at 110 per Deane and Gaudron J.J; and at 189-190 per Toohey J. In the postscript to his judgment Toohey J. said at one end of the spectrum native title rights may approach the rights flowing from full ownership at common law. On the other hand there may be an entitlement to come onto the land for ceremonial purposes, where all other rights in the land belong to another group. See also *Wik*, *supra* note 51 at 169 per Gummow J; *Mason v. Tritton* (1994) 34 N.S.W.L.R. 572; *Wilkes v. Johnsen*, *supra* note 69; and *Yanner*, *supra* note 69.

⁹⁶ *Mabo [No.2]*, *supra* note 1 at 60 per Brennan J., at 89 per Deane and Gaudron J.J; *Native Title Act Case*, *supra* note 39 at 439, 452-453; *Fejo*, *supra* note 62 at 756 per Kirby J. See also *Newcrest Mining (WA) Ltd v. The Commonwealth* (1997) 190 C.L.R. 513, 147 A.L.R. 42 [hereinafter *Newcrest Mining* cited to A.L.R.] at 112-113.

⁹⁷ See also ss. 6 and 223 of the NTA and *Yarmirr*, *supra* note 7.

⁹⁸ The onus of proof of extinguishment oscillates between the government and the claimants. See the decisions of *Walker v. New South Wales* (1994) 182 C.L.R. 45, 126 A.L.R. 321; *Coe v. Commonwealth* (1993) 118 A.L.R. 193; *Yorta Yorta*, *supra* note 8 at 284-286 per Branson and Katz J.J; *Ward*, *supra* note 12 at 350-352 per Beaumont and von Doussa J.J. See also *Mabo [No.2]*, *supra* note 1 at 183 per Toohey J; *Mason v. Tritton*, *supra*, note 95 at 584 per Kirby J; and *Native Title Act Case*, *supra* note 39 at 422-423.

⁹⁹ *Wik*, *supra* note 51 at 87 per Brennan C.J.

¹⁰⁰ *Ibid.* at 85 per Brennan C.J., at 125 per Toohey J.; at 146-147 per Gaudron J; at 185 per Gummow J; and at 247 per Kirby J.

¹⁰¹ That is, native title is extinguished by the creation of rights that are inconsistent with the native holders continuing to hold their rights and interests. See *Mabo [No.2]*, *supra* note 1 at 63-64, 68-69, 89-90, 94 per Brennan J; at 110-111 per Deane and Gaudron J.J; at 195-196 per Toohey J; *Native Title Act Case*, *supra* note 39 at 439; *Fejo*, *supra* note 62 at 753 per Kirby J. See also *Wik*, *supra* note 51 at 84-87 per Brennan C.J.

¹⁰² *Fejo*, *supra* note 62 at 740. Although there is a slim argument that it can. See the dissenting reasons of North J. in *Ward*, *supra* note 12.

regulation;¹⁰³ (vi) can be effected in three ways (laws or acts which extinguish native title; laws or acts that create rights in third parties which are inconsistent with native title; and laws or acts by which the Crown acquires full beneficial ownership of land);¹⁰⁴ (vii) is effected by the grant of a fee simple interest in land;¹⁰⁵ and (viii) is effected by the constitution of a public road from Crown land through formal statutory procedures extinguishes native title.¹⁰⁶

Thirdly, in determining native title claims in Australia the Federal Court, as the Court with primary jurisdiction under the NTA, must look to the construction of the provisions of the NTA and other applicable legislation.¹⁰⁷ In addition, the common law principles recognised or enunciated in *Mabo [No.2]*, have been considered and applied in subsequent decisions by the High Court.¹⁰⁸ The relevant starting point is the question of fact posed by the NTA in s. 223. That is, what are the rights and interests in relation to land or waters, which are possessed under the traditional laws acknowledged, and the traditional customs observed by the claimants?¹⁰⁹

2.3 Canadian jurisprudence

Undoubtedly the relevance of Canadian jurisprudence to the Australian context is a slippery thing in respect of constitutional differences and much judicial ink and even more academic ink has been expended. I will not repeat that exposition, except to highlight that if recourse to the Canadian experience assists in the debate in Australia it

¹⁰³ *Yanner*, *supra* note 69. See also *Wilkes v. Johnsen*, *supra* note 69.

¹⁰⁴ *Wik*, *supra* note 51 at 84-85 per Brennan C.J.

¹⁰⁵ *Mabo [No.2]*, *supra* note 1 at 69 per Brennan J; at 110 per Deane and Gaudron J.J; *Native Title Act Case*, *supra* note 39 at 439; *Wik*, *supra* note 51 at 84-85 per Brennan C.J; *Fejo*, *supra* note 62 at 737-739 per Gleeson C.J., Gaudron, McHugh, Gummow, Hayne and Callinan J.J; and at 754ff per Kirby J. See also *Bodney v. Westralia Airports Corporation* (2000) 180 A.L.R. 91; 109 F.C.R. 178. This was a claim to land at the Perth airport held in freehold by the Commonwealth. Lehane J. found that a grant of a fee simple estate whether to the Crown, a local authority or a private individual, extinguishes native title.

¹⁰⁶ *Fourmile v. Selpam Pty Ltd* (1998) 80 F.C.R. 151; 152 A.L.R. 294.

¹⁰⁷ *Yarmirr*, *supra* note 7 at 178 per Kirby J.

¹⁰⁸ See the *Native Title Act Case*, *supra* note 39 at 452, 492; *Waanyi Case*, *supra* note 47 at 613; *Wik*, *supra* note 51 at 84-85, 100, 129, 135, 175-176, 213; *Fejo*, *supra* note 62 at 736-737, 759; and *Yanner*, *supra* note 69; and *Yarmirr*, *supra* note 7.

¹⁰⁹ See s. 223 of the NTA. *Yarmirr*, *supra* note 7 at 122, 178.

should be made. Paul Havemann made the valid point that Australia, New Zealand and Canada may be different, but essentially there is much to be gained from comparative analysis and some fundamental factors remain the same in each jurisdiction.¹¹⁰ The parallels of colonisation leading to dispossession cannot be denied.¹¹¹ Those factors resonate in relationships to history and land. However, whether the kangaroo should bound onto the path of the beaver in subsequent native title decisions requires an analysis of the constitutional construct and the histories of each country before any meritorious comment can be made.¹¹² This thesis is not about that. The purpose is simply to highlight the slippery slope in native title discourse by reference to the Canadian jurisdiction.

A difference, and perhaps a legitimate barrier to comparative study is history. Historically, Canada (despite important regional differences) has embarked upon a treaty process and it assumed responsibility for Indian Affairs in 1867 under the *British North America Act, 1867* (U.K.), [hereinafter the BNA Act]¹¹³ while Australia had no formal mechanism allocating even part responsibility until 1967.¹¹⁴

The second difference always proffered to distinguish Canadian jurisprudence from the Australian context is the constitutional protection (outlined below) afforded indigenous rights and interests in Canada. At the risk of generalizing it has perhaps been invoked prematurely and often erroneously. The important fact often not realised in Australia is the constitutional protection does not create or generate the right protected.¹¹⁵ It was a

¹¹⁰ Havemann, *supra* note 5 at 1-10.

¹¹¹ *Ibid.* For a dramatic illustration on dispossession and its effects in British Columbia salmon fisheries, Canada, see Harris, *supra* note 4.

¹¹² For the most comprehensive comparative analysis of the colonial occupation and history of Canada, Australia and New Zealand available to date see Havemann, *supra* note 5 at 65-181.

¹¹³ *British North America Act, 1867* (U.K.), 30 & 31 Vict., c.3 is now the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3.

¹¹⁴ It is important to realise that unlike other parts of Canada, historically, British Columbia has not embarked upon extensive treaty negotiation. Pejoratively tied to that fact is many of the Supreme Court of Canada [hereinafter the SCC] decisions have originated from British Columbia courts. For example *R. v. Sparrow* [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*]; *Van der Peet*, *supra* note 15; *Delgamuukw*, *supra* note 78; and still to come the case of *Haida Nation v. British Columbia* [2002] BCCA 147 [hereinafter *Haida Nation*].

¹¹⁵ The content of native title and Aboriginal title is not as different as it initially seems. For example institutional names like Aboriginal title and native title are forms of vernacular. They are terms of

constitutional protection granted in 1982 for those rights existing. It did not revive those that were extinguished.¹¹⁶

There is a real tension with various members of the Australian Federal Court in adopting the Canadian approach.¹¹⁷ The High Court as a whole has cast warnings. In *Fejo*, in the joint judgment the justices observed that little direct assistance is to be had from decisions in other countries.¹¹⁸ Similarly, Kirby J. in *Fejo*, said that care must be exercised in the use of authorities from other former colonies and territories.¹¹⁹

However, from the outset, let it be clearly understood that I am not necessarily advocating the adoption of the Canadian position. Rather I highlight similar problems in each jurisdiction as an aide in avoiding bias in history, culture, and therefore law so that Australian native title decisions are not inadvertently contrived. My principal objective is to ensure that the dynamics of the indigenous perspective of land and history are embraced by the High Court. In any event, a comparative look at Canada and the similar themes emerging grants a refreshing perspective and warns of traps. That is why I have sought to have recourse to Canada, yet the central focus remains Australia. It is therefore important at the outset to set out the parameters of the types of Aboriginal rights and interests in Canada and how such rights and interests are afforded constitutional protection.

2.3.1 *The constitutional framework*

By way of background, Westminster created the Federal system in Canada in 1867 by the BNA Act. Effectively the statute creates a model of co-ordinate federalism, where the provinces (known in Australia as States) are legally equal units. The central government

the common law to refer to the indigenous relationship with land and the rights arising or parasitic upon that relationship. Semantics are at the very entry point of the illusion.

¹¹⁶ *Sparrow*, *supra* note 114 at 1091-1092.

¹¹⁷ In *Ward*, *supra* note 12 Beaumont and von Doussa J.J. reject the Canadian approach. Comparatively, North J. in dissent makes some recourse to Canadian authority. In the decision at first instance *Ward v. Western Australia*, *supra* note 76 Lee J. relied heavily on Canadian jurisprudence.

¹¹⁸ *Fejo*, *supra* note 62 at 739.

¹¹⁹ *Ibid.* at 754-755.

can be described pragmatically as slightly more equal than the provincial units. Accordingly, there are two levels of government with inherent legislative jurisdiction.

Canada assumed responsibility for Indian Affairs in 1867 under s. 91(24) of the BNA Act.¹²⁰ Pursuant to s. 91(24), the Federal Parliament has the power to make laws in relation to “Indians, and lands reserved for the Indians”. Section 91(24) also grants the Federal Government exclusive power to extinguish Aboriginal rights including Aboriginal title.¹²¹ Section 109¹²² vests underlying title to lands with the provincial Crown, and that title is subject, by the terms of s. 109, to other interests in land, which include Aboriginal title.¹²³ In addition s. 91(24) protects a core of “Indianness” from provincial intrusion through the doctrine of inter-jurisdictional immunity and that core encompasses Aboriginal rights.¹²⁴ The primary legislative tool of the Federal Government is the *Indian Act*, R.S.C. 1985 (5th Supp.) c.1 [hereinafter the *Indian Act*].

In 1982, the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 was enacted. It ensured Canada became completely autonomous in the sense that there was nothing that could not be done domestically – that is without Westminster’s approval or legislative Act. The 1982 constitutional amendment also included the enactment of the Charter of Rights and Freedoms.

The primary provision of concern, and the often ill cited reason why Canadian jurisprudence is not followed in Australia, is s. 35.¹²⁵ That provision is outside of the

¹²⁰ Comparatively, Australia had no formal mechanism allocating even part responsibility until 1967 when there was a referendum, which amended the Constitution under which the Commonwealth of Australia took some responsibility – s. 51(xxxiv) the race power. See also Havemann, *supra* note 5 at 22-65, 123-181 on historical differences between Australia and Canada.

¹²¹ *Delgamuukw*, *supra* note 78 at 1115-1119 per Lamer C.J.

¹²² Watch the decision of the Court of Appeal of British Columbia *Haida Nation*, *supra* note 114 as it progresses to the SCC on appeal. Section 109 was raised in that case, but the decision of the Court of Appeal of British Columbia was decided so narrowly that the court gave a unanimous judgment and avoided addressing the issue.

¹²³ *Delgamuukw*, *supra* note 78 at 1115-1119 per Lamer C.J.

¹²⁴ See P.W. Hogg, *Constitutional Law of Canada*, 4th student ed. (Toronto: Carswell, 1996). See also *Dick v. The Queen* [1985] 2 S.C.R. 309 at 326 per Beetz J.

¹²⁵ Section 25 is also important. It states that nothing in the Charter or Constitution can “abrogate or derogate” from Aboriginal rights. This provision can be used to have rights interpreted in a particular way. Nonetheless it is not a ground on which a claim can be founded. See P.W. Hogg,

Charter of Rights and Freedoms and provides for the constitutional entrenchment of Aboriginal rights in Canada.¹²⁶

Section 35(1) provides:

- “(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, ‘Aboriginal peoples of Canada’; includes the Indian, Inuit, and Metis peoples of Canada.
- (3) For greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”

In 1982 the provision came into force, which recognized and affirmed existing Aboriginal and treaty rights. In 1983, subsection (3) was added ensuring that treaty rights included not only those in existence, but also those that might be acquired after that date by way of land claims agreement.

2.3.2 The evolution of section 35(1)

Any discussion of the protection afforded by s. 35(1) and the recognition by the Courts of the spectrum of Aboriginal rights must begin with three “celebrated” decisions of the Supreme Court of Canada [hereinafter the SCC], but by way of background the issue of Aboriginal title first came before the SCC and the Privy Council in 1888 in

& M.E. Turpel, “Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues” (1995) 74 Canadian Bar Rev. 187-224. They argue that the provision can be used as an interpretative tool.

¹²⁶

On the relationship of Aboriginal Rights and the Constitution see B. Slattery, “Understanding Aboriginal Rights” (1987) 66 Canadian Bar Rev. 727 and more recently B. Slattery, “First Nations and the Constitution: a question of trust” (1992) 71 Canadian Bar Rev. 261-293.

*St. Catherine's Milling & Lumber Co. v. R.*¹²⁷ [hereinafter *St. Catherine's Milling*]. In that decision the Privy Council described Aboriginal title as a "personal usufructory right". This right of occupation and use was held to be dependent on the good will of the Sovereign, and therefore subject to unilateral extinguishment by the Crown.¹²⁸

The issue was not before the SCC again until the Nisga'a case some 90 years later in 1970.¹²⁹ In *Calder v. Attorney-General of British Columbia*¹³⁰ [hereinafter *Calder*] the Nisga'a people sought a declaration that their title had never been extinguished and six of the seven person bench all held Aboriginal title was recognised by the common law and not dependent upon an act of State. The nature of an Aboriginal right, as recognised by the Courts changed. It was an important moment. Six judges recognized that Aboriginal title existed and was based on long use and occupation by Aboriginal peoples of their traditional territories. It did not depend on the extension of the *Royal Proclamation, 1763* (U.K.), to the lands in question. The bench divided over extinguishment. Hall J. made a significant move in terms of Aboriginal rights jurisprudence. He required explicit extinguishment, a clear and plain intent to extinguish Aboriginal rights. Three other judges were of the view that any exercise of Sovereign authority that is inconsistent with the Aboriginal right, extinguished that right. Despite the disparity on the issue of extinguishment the decision ushered in the modern era. The Federal Government began treaty negotiation.

Dickson J. (as he then was) in *Guerin v. R.*¹³¹ [hereinafter *Guerin*] picked up the comments of Hall J., and affirmed that Aboriginal title exists in common law, and was

¹²⁷ (1888), 14 App. Cas. 46 (P.C.).

¹²⁸ Chief Justice John Marshall of the United States in a trilogy of cases *Johnson v. McIntosh* 21 US (8 Wheat) 543 (1823), *Cherokee Nation v. Georgia* 30 US (5 Pet) 1 (1831) and *Worcester v. Georgia* 31 US (6 Pet) 515, 8 L.Ed. 483 (1832), reviews the history of the dealings between British authorities and Aboriginal peoples in North America, including Canada. This review was later adopted by Hall J. in *Calder v. Attorney-General of British Columbia* [hereinafter *Calder*] [1973] S.C.R. 313 at 383.

¹²⁹ See P. Tenant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990).

¹³⁰ *Calder*, *supra* note 128.

¹³¹ (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 325 [cited to S.C.R.].

“derived from the Indians’ historic occupation and possession of their tribal lands”.¹³² A further significant point to emerge from the case was that the inalienability of Aboriginal title to the land gave rise to a fiduciary duty on the part of the Crown. That fiduciary duty resonates in every subsequent decision under s. 35(1).¹³³

In 1990, the SCC discussed the significance of s. 35 in *R. v. Sparrow*¹³⁴ [hereinafter *Sparrow*] where it was required for the first time to explore the scope of s. 35(1). In this instance the scope was concerned with an Aboriginal right. Sparrow was charged with violating the terms of a Musqueam food fishing licence, which were dictated by fisheries legislation. Sparrow argued he was exercising an existing Aboriginal right to fish and that the net length restriction contained in the Musqueam Band’s licence was inconsistent with s. 35 and therefore invalid.¹³⁵

The test enunciated by the Court in this case emerges from the analysis of “existing” and “affirmed and recognised”. The SCC used rights language. Under “existing” two questions emerged:

- what is the scope and extent of the right, taking into account the Aboriginal perspective on the right in question; and
- has the right been extinguished?

In considering the word “existing” in s. 35(1) the SCC held the rights to which s. 35(1) applies are those that were in existence when the provision came into effect. Accordingly, extinguished rights were not revived. Interestingly, the SCC does not hold the word “existing” as a limitation on those rights frozen in time. Rather, the SCC was at pains to suggest existing Aboriginal rights must be interpreted “flexibly so as to permit their evolution over time” and “the notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations” and rights under s. 35 are “affirmed in a contemporary form rather than in their primeval simplicity and vigour”.

¹³² *Ibid.* at 374.

¹³³ The decision in *Sparrow*, *supra* note 114 extends the fiduciary concept in the sense it is based upon an historical relationship.

¹³⁴ *Sparrow*, *supra* note 114.

And bluntly, “an approach to the constitutional guarantee embodied in s. 35 which would incorporate frozen rights must be rejected.”¹³⁶

In considering the words “recognised and affirmed” the Court looked at the impact of s. 35 on the regulatory power of Parliament. There were two arguments before the SCC: first, that s. 35 offered no constitutional protection, but merely recognised a right, and second, that s. 35 provided absolute protection. The Court dictated a middle road to the parties, namely that s. 35(1) provides a protection, but not in an absolute sense.¹³⁷ The Court applied its own form of limitation:

“.....legislation that affects the exercise of Aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference... .”¹³⁸

The Court extracted its authority to do this from the words “recognized and affirmed” which incorporate the fiduciary relationship of the Crown to Aboriginal peoples and so “import some restraint on the exercise of sovereign power”.¹³⁹ The SCC took the fiduciary duty on the Crown, as defined by Dickson J. (as he then was) in *Guerin* to explain the demand for the internal limit of justification. The SCC looked to reconcile s. 91 (24) of the *Constitution Act, 1867* and the fiduciary duty on the Crown, and held that the best way to achieve that reconciliation was to demand the justification of any government regulation that infringed upon or denied an Aboriginal right.¹⁴⁰

Justification according to the SCC involves the following critical path of inquiry. First, has there been a prima facie interference with the right? There are a number of questions the Court considers relevant to that determination:

¹³⁵ In that case the right to fish can be seen as being equated to a property right.

¹³⁶ *Ibid.* at 1108.

¹³⁷ *Ibid.* at 1109.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ For an analysis of the justificatory element under s. 35(1) see K. McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified?” (1997) 8:2 Constitutional Forum 33.

- is the limitation unreasonable;
- does the regulation impose undue hardship; and
- does the regulation deny to the holders of the right their preferred means of exercising the right?

Throughout this first inquiry on existing rights the onus lies on the individual Aboriginal or group asserting the Aboriginal right. The second step under the “recognised and affirmed” justificatory process addresses the question of what constitutes legitimate regulation of a constitutional Aboriginal right.¹⁴¹ The onus is then on the Government to establish:

- a valid legislative objective that is “compelling and substantial”;
- the Crown has not acted in a manner contrary to its fiduciary duty;
- priority is given to Aboriginal interests at stake (so that any allocation of priorities after valid compelling and substantial objectives have been implemented must be given to Aboriginal people);
- the government has impaired the Aboriginal interest as little as possible;
- fair compensation is required if infringement has occurred; and
- consultation.

The SCC observed that this was not an exhaustive list and that recognition and affirmation requires “sensitivity to and respect for the rights of Aboriginal peoples.”¹⁴²

The scope for governmental interference was substantially extended in *R. v. Gladstone*¹⁴³ [hereinafter *Gladstone*]. That was the major contribution (and flaw) of this case.¹⁴⁴ The SCC elaborated on what amounts to “compelling and substantial”. The Court explained objectives that were directed at either one of the purposes underlying recognition and

¹⁴¹ For an extensive analysis on the decision see I. Binnie, “The Sparrow Doctrine: beginning of the end or end of the beginning” (1990) *Queens L. J.* 217-253.

¹⁴² *Sparrow*, *supra* note 114 at 1119.

¹⁴³ [1996] 2 S.C.R. 723.

¹⁴⁴ For a detailed analysis of the decision see the discussion in D.C. Harris, “Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery” (2000) 34:1 *UBC Law Review* 195 at 225-228. See generally Harris, *supra* note 4.

affirmation of Aboriginal rights by s. 35(1), which are recognition of prior occupation of North America by Aboriginal peoples or the reconciliation of prior Aboriginal occupation and assertion of sovereignty, would be compelling and substantial.¹⁴⁵ For example, conservation of fisheries in *Sparrow* is accepted and “pursuit of economic and regional fairness” and “recognition of the historical reliance upon and participation in the fishery by non-Aboriginal groups.”¹⁴⁶ Sports’ fishing, without a significant economic component, fails.¹⁴⁷ The SCC made it clear that a claim for Aboriginal rights or title was to be examined under the four-part analysis stated by the SCC in *Sparrow*.¹⁴⁸

*R. v. Van der Peet*¹⁴⁹ [hereinafter *Van der Peet*] raised the issue left unresolved in *Sparrow*, namely how were Aboriginal rights recognized and affirmed by s. 35(1) to be defined? Van der Peet was charged with violating a fish food licence under s. 61(1) of the *Fisheries Act, 1979*, R.S.C. c. F-14, for offences of selling fish caught under the authority of an Indian fish food licence contrary to British Columbia fishery regulations. Van der Peet argued that that the British Columbia fisheries regulations infringed her “existing” right to sell fish and was therefore invalid on the basis that they violated s. 35(1).

The decision elaborated on the scope and extent of the “existing right”. Lamer C.J. commenced with a rights analysis common to the provisions of the Charter of Rights and Freedoms, yet s. 35 stands outside the Charter. He took a liberal enlightenment view, that “rights are the way in which the inherent dignity of each individual in society is

¹⁴⁵ Gladstone, *supra* note 143 at 774. See also the critique of the justificatory process by P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: Toronto University Press, 2001) at 184-193. Despite the requirement of priority to Aboriginal interests the SCC in *Gladstone* and *Delgamuukw*, *supra* note 78 looks at allocating resources to non-Aboriginal interests thereby trumping Aboriginal rights.

¹⁴⁶ See *Sparrow*, *supra* note 114 at 1115.

¹⁴⁷ *R. v. Adams* [1996] 3 S.C.R. 101. See also *Delgamuukw*, *supra* note 78 at 1111. In that case the SCC expanded government objectives to include the development of agriculture, forestry, mining and hydroelectric power, the general economic development of British Columbia, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations to support those aims.

¹⁴⁸ Gladstone, *supra* note 143 at 742.

¹⁴⁹ *Van der Peet*, *supra* note 15.

respected”¹⁵⁰ but was alert to the fact that Aboriginal rights cannot be defined on the basis of the philosophical precepts of liberal enlightenment. Accordingly, he was of the opinion that Aboriginal rights must be viewed differently from Charter rights because “they are rights held only by Aboriginal members of Canadian society.”¹⁵¹ The difficult task for the SCC as Lamer C.J. suggested was “to define Aboriginal rights in a manner which recognised that Aboriginal rights are rights, but which does so without losing sight of the fact that they are rights held by Aboriginal people because they are Aboriginal.”¹⁵² In embarking upon that task Lamer C.J. gave a mandate to the Court:

“The Court must neither lose sight of the generalised constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society.”¹⁵³

Lamer C.J. added to the very first element of the test¹⁵⁴ enunciated in *Sparrow*, that in order to be an Aboriginal right an activity must be an element of a practice, custom, or tradition “integral to the distinctive culture” of the Aboriginal group claiming the right. Lamer C.J. outlined a number of factors to assist in that analysis. There are ten interpretative canons. In particular, the practices, customs and traditions, which constitute Aboriginal rights, must have continuity with the traditions, customs and practices that existed prior to contact. In essence, what amounts to integral is a defining and central attribute of the Aboriginal society in question, and that activity must have been integral prior to contact.¹⁵⁵

¹⁵⁰ *Ibid.* at 534.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.* at 535.

¹⁵³ *Ibid.*

¹⁵⁴ Under the test in *Sparrow*, *supra* note 114 emerging from the word existing is the initial question of the scope and extent of the right.

¹⁵⁵ The SCC notes there is an evidentiary difficulty involved. Accordingly, it is prepared to look at post-contact activity, but requires a connection or some sort of continuity (this is the difficult element in the *Van der Peet* decision) but note L’Heureux-Dube J. in dissent observes that this is problematic in the majority decision. See also J. Borrows, “Fish and Chips: Aboriginal commercial fishing and gambling rights in the Supreme Court of Canada ” (1996) 50 C.R. (4th) 230-244. See also J. Borrows, “The trickster: integral to a distinctive culture” (1997) 8 Constitutional Forum 27-32. Borrows gives an overview of the decision and critiques the SCC’s

In 1996 in *R. v. Adams*¹⁵⁶ [hereinafter *Adams*] the SCC made it clear that Aboriginal rights exist on a spectrum, with Aboriginal title at one end and other non-land based rights at other positions along that spectrum.¹⁵⁷ Similarly, in 1996 in *Wik Gummow J.* referred to the spectrum of native title rights and interests in Australia.¹⁵⁸

The SCC decision in *Delgamuukw* formally adds Aboriginal title to the s. 35 analysis.¹⁵⁹ The test originally set out in *Sparrow*, is, in part, redefined in *Delgamuukw*. Two major distinctions are evident in the application of the test to claims for Aboriginal title. The requirement that an activity be integral, is replaced with an occupancy requirement, determined by both the Aboriginal perspective and the common law; and second, proof of that occupancy is required at the time of assertion of Crown sovereignty, as opposed to the period prior to contact. A third factor of the decision is that occupation at sovereignty must have been exclusive.

Delgamuukw also elaborated on the nature of Aboriginal title in Canada. The SCC affirmed that Aboriginal title is an interest in land, a collective right to land held by all members of the community.¹⁶⁰ It is inalienable except to the Crown.¹⁶¹ Inalienability did not preclude the SCC finding Aboriginal title was an interest in land. In particular Lamer C.J. emphasised that Aboriginal title is not a non-proprietary interest that amounts to no more than a licence to use and occupy the land.¹⁶² Aboriginal title predates and

notion that an Aboriginal right is integral and distinct. He argues that the approach elucidated by the SCC freezes the development of titles and rights in the distant land and this is contrary to the history of Canada.

¹⁵⁶ *Adams*, *supra* note 147.

¹⁵⁷ *Ibid.* at 118, and reconfirmed in *Delgamuukw*, *supra* note 78 at 1094-1095, 1097ff.

¹⁵⁸ *Wik*, *supra* note 51 at 169 per Gummow J., who relied on *Mabo [No.2]*, *supra* note 1.

¹⁵⁹ The case involved the Gitksan and Wet'suwet'en hereditary chiefs claim of Aboriginal title. Lamer C.J. delivered the principal judgment for himself Cory and Major J.J. La Forest J. delivered a separate judgment for himself and L'Heureux Dube J. concurring in the result but taking a different approach. McLachlin J. agreed with Lamer C.J., and substantially with La Forest J.

¹⁶⁰ *Delgamuukw*, *supra* note 78 at 1080, 1082-1083.

¹⁶¹ *Ibid.* at 1081.

¹⁶² For an examination of the decision in *Delgamuukw*, *supra* note 78 and the proprietary nature of Aboriginal title see K. McNeil, "Aboriginal Title as a Constitutionally Protected Property Right", in Owen Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000) at 55-75.

survives the assertion of European sovereignty and is founded upon the prior occupation of Canada by Aboriginal peoples.¹⁶³ It encompasses the right to exclusive use and occupation of the land for a variety of purposes and the right to decide to what use Aboriginal title lands are to be put, but the protected uses must not be irreconcilable with the nature of the group's attachment to that land.¹⁶⁴ Aboriginal and Crown title co-exist.¹⁶⁵ Lamer C.J. said a right in land is more than the right to engage in specific activities that may be themselves Aboriginal rights.¹⁶⁶ Accordingly, it can be seen that the content of Aboriginal title in Canada has an inherent limit, whereby the continuity of relationship is both rooted in the past and stewarded for the future so that uses of the land that would threaten the future relationship are by their very nature excluded from the content of Aboriginal title.¹⁶⁷ This is the inherent limit flowing from the definition of Aboriginal title as a *sui generis* interest in land. The right to use the land for a variety of activities is not restricted to use that is an aspect of practices, customs and traditions that are integral to the distinctive cultures of Aboriginal societies. Those activities do not constitute the right *per se*; rather they are "parasitic" on the underlying title. Aboriginal title in Canada is *sui generis* and so distinguished from other proprietary interests at common law. Yet Lamer C.J. was cognisant that the *sui generis* nature of Aboriginal title precluded the application of traditional real property rules to elucidate the content to that title.¹⁶⁸ Yet in Canada Aboriginal title must be understood by reference to both the common law and the Aboriginal perspective.¹⁶⁹

Following much academic speculation and obiter comments of Courts in earlier decisions, treaty rights were added to the s. 35 analysis in *R. v. Badger*¹⁷⁰ [hereinafter *Badger*] and again confirmed in *R. v. Marshall*¹⁷¹ [hereinafter *Marshall*]. Those decisions are authority for the proposition that the *Sparrow* test applies to treaty rights,

¹⁶³ *Delgamuukw*, *supra* note 78 at 1082.

¹⁶⁴ *Ibid.* at 1082-1083, 1083-1088, 1111-1112, 1112-1113.

¹⁶⁵ *Ibid.* at 1082, 1088, 1117.

¹⁶⁶ *Ibid.* at 1080-1081.

¹⁶⁷ *Ibid.* at 1088.

¹⁶⁸ *Ibid.* at 1090-1091.

¹⁶⁹ *Ibid.* at 1081.

¹⁷⁰ (1996) 133 D.L.R. (4th) 324.

¹⁷¹ [1999], 3 S.C.R. 456, 179 D.L.R. (4th) 193 [cited to S.C.R.].

subject to one addition. The first inquiry is varied.¹⁷² The variation is in the source of the right, that is, the treaty document itself, to which the Court looks for evidence of the scope of the right claimed. The agreement is a written, presumably consensual, agreement. The word “presumably”, is used in the sense that Aboriginal Elders entering early treaties understood fully what was being agreed. Language, history and custom of the parties are fundamentally different raising suspicions as to the balance of power in early treaties. That same suspicion is aroused in the SCC. In *Badger* Cory J. held that when considering a treaty right a Court must take into account the context, in which a treaty is negotiated, concluded, and committed to writing.

Self-government may also be encompassed by s. 35(1). The SCC has not yet addressed in any definitive way the right to self-government under s. 35(1). The issue first came before the SCC in *R. v. Pamajewon*.¹⁷³ Lamer C.J. held that rights to self-government if they existed cannot be framed in excessively general terms. While the issue was pleaded in *Delgamuukw*, the SCC did not address the issue, but impliedly acknowledged a right to self-government flowing from Aboriginal title.¹⁷⁴ To date there is no SCC decision approving any kind of broad general right to self-government. There is only approval in principle of fairly narrow rights of self-government, and in any event the *Sparrow* test appears to remain applicable.¹⁷⁵ The issue however was squarely addressed in *Campbell v. British Columbia*¹⁷⁶ [hereinafter *Campbell*]. Gordon Campbell (now the Premier of British Columbia) and other members of the BC legislature in opposition at the time, sought an order declaring that the Nisga’a treaty was, in parts, inconsistent with the

¹⁷² It is interesting that the *Sparrow*, *supra* note 114, justification test applies to treaty rights, which are contractually based, and yet a unilateral breach by the government is permitted under the test. Random application of the Sparrow test is also difficult because treaties are very different, for example the Douglas Treaties in Vancouver Island are very different to the Prairie Treaties.

¹⁷³ [1996] 2 S.C.R. 821.

¹⁷⁴ Also see Lamer C.J.C. in *Van der Peet*, *supra* note 15 at 542. In *Johnson v. McIntosh*, *supra* note 128 Marshall C.J. concluded after reviewing the history of imperial policy that indigenous peoples right to govern themselves had been diminished, but not extinguished. On Aboriginal self-government and the Canadian Charter see K. McNeil, “Aboriginal Governments and the Canadian Charter of Rights and Freedoms” in McNeil, *supra* note 15.

¹⁷⁵ On the relationship between Aboriginal title and self-government see K. McNeil, *Defining Aboriginal Title in the 1990's: Has the Supreme Court finally got it right?* (Toronto: York University, Robarts Centre for Canadian Studies, 1998). See also the work of First Nations scholars O. Mercredi, & M.E. Turpel Lafonde, *In the Rapids, Navigating the Future of First Nations* (Toronto: Penguin Books, 1994)

Constitution and therefore, in parts, of no force and effect.¹⁷⁷ It was a challenge that a new order of government was unconstitutional. The plaintiffs argued that all legislative power in Canada was exhaustively distributed between Parliament and the legislative assemblies by virtue of the BNA Act in 1867.¹⁷⁸ The Supreme Court of British Columbia, considering the preamble of the BNA Act and relying on a number of constitutional principles held that when the Parliament of the UK enacted the BNA Act not all legislative power was distributed through ss. 91 and 92.¹⁷⁹ The decision in *Campbell* gives recognition to a third arm of government. The question then arises of how this third level of government fits into Canada's co-ordinate Federal system. That question becomes more pressing when the potential for the Nisga'a agreement to be a template for other treaties is considered. A three level system of government will no doubt produce some very interesting conflict cases.

The Treaty states expressly in chapter 2, s. 1 that:

“this agreement is a treaty and land claims agreement within the meaning of sections 25 and 35 of the Constitution Act, 1982.”

It is significant to note at this point how Canada has come full circle in terms of the Nisga'a Nation. Their history was reviewed in both the majority and the dissenting judgments in *Calder v. Attorney General of B.C.* where Judson J. for the majority observed the Nisga'a are:

¹⁷⁶ [2000], 189 D.L.R. (4th) 333; 79 B.C.L.R. (3d) 122 [cited to B.C.L.R.].

¹⁷⁷ On August 4 1998, Canada, the province of British Columbia and the Nisga'a Tribal Council concluded a final agreement. The Treaty came into effect on 11 May 2000: see *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2; and *Nisga'a Final Agreement Act*, S.C. 2000, c. 7.

¹⁷⁸ The plaintiffs' arguments were threefold: (a) the treaty violated the Constitution because parts of it purport to bestow upon the governing body of the Nisga'a Nation legislative jurisdiction inconsistent with the exhaustive division of powers granted to Parliament and the legislative assemblies of the provinces by ss. 91 and 92; (b) the legislative powers set out in the treaty interfered with the concept of royal assent; and (c) by granting legislative power to citizens of the Nisga'a Nation, non-Nisga'a Canadian citizens who reside in or have other interests in the territory subject to Nisga'a government are denied rights guaranteed to them by s. 3 of the Charter. Section 3 guarantees every citizen of Canada the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

¹⁷⁹ For example the Constitution embraces unwritten as well as written rules. Unwritten doctrines include full faith and credit, privileges of provincial legislatures, and the regulation of free speech.

“descendants of the Indians who have inhabited since time immemorial the territory in question, where they have hunted, fished and roamed.”¹⁸⁰

The Treaty is characterized as having four basic components, only one of which is relevant for these purposes – “a new order of government”. In Chapter 11 of the Treaty legislative jurisdiction was sophisticatedly divided into two groups; pragmatically to govern the Nisga’a Nation and the villages. Williamson J. held the right to Aboriginal title involves a right to make decisions for land and a social structure for community decision-making - the concept of self-government.¹⁸¹ Essentially, Williamson J. read down the scope of self-government, suggesting the Nisga’a are given land that needs management, so obviously a social structure for management is required. Yet it is really much more than that.¹⁸²

2.3.3 *The interpretative principles of section 35*

Section 35 encompasses a broad spectrum of Aboriginal rights, ranging from Aboriginal title to specific rights. Rights to self-government it seems are also encompassed by s. 35(1). Irrespective of the right afforded constitutional protection by s. 35(1) three principles apply:

- a broad and generous purposive approach is required in favour of Aboriginal peoples;
- s. 35 provides a constitutional framework and two facts need to be reconciled:
 - Aboriginal custom, tradition and practice; and
 - the sovereignty of the Crown; and
- the Court must incorporate the Aboriginal perspective.

¹⁸⁰ *Calder*, *supra* note 128 at 317.

¹⁸¹ *Campbell*, *supra* note 176.

¹⁸² See J. Borrows, “A Genealogy of Law: Inherent Sovereignty and Self-Government” (1992) 30 *Osgoode L. J.* 291. Borrows recasts the characterization of self-government from a First Nations perspective. He argues the court decisions have been miscasting the issues, and self-government

The point of explaining the background cases in Australia and Canada is now reached. Working within this framework I begin by examining the relationships at law that underlay a theoretical foundation for Australian decisions. At this point it is trite to remind of the words iterated by Gummow J. in *Yanner*, that “ingrained, but misleading, habits of thought and understanding lurk in this area of law”.¹⁸³ With a component of comparative reference the next two chapters attempt to delineate the habits of thought in relationships to history and property.

¹⁸³ has persisted with settler society. He uses his own community to illustrate the point. For example how they structure their society to deal with the imposition of the *Indian Act* and its encroachment. *Yanner*, *supra* note 69 at 279 per Gummow J.

Chapter Three

The Tide of History: Winning the battle yet frozen at war.

3.1 Relationships to history

The contemporary discussion of native title is rooted in the history of Australia and its inhabitants. Henry Reynolds, Australia's pre-eminent morally conscious historian, argued that the prevailing interpretation of history has caused the moral and political map of Australian settlement to be shaped by the foundation myth that Australia was *terra nullius*.¹⁸⁴ That foundational myth creates a nexus between history and the law, and the greatest illustration of that nexus was the High Court's decision in *Mabo [No.2]*. Henry Reynolds recently asserted the case was as much about historiography as about jurisprudence, and critics of the High Court were more often concerned about the reinterpretation of history than about the recasting of the law.¹⁸⁵ The history of Australia provides the contextual framework and background for an understanding of native title rights and interests in the Australian legal system. That nexus between the history of Australia and the articulation of native title rights and interests by Australian Courts has become clearly visible as parties before the Courts in native title claims present their own perspective of the history of Australian land, people and culture. Reynolds, as a historian, illustrated that the legal, political, and moral issues dealt with by the Court in *Mabo [No.2]* could be traced directly back to the very beginning of settlement and the "confusion and uncertainty of British policy towards the Aborigines, their land, and their legal status".¹⁸⁶ There is a contemporary historical conflict being played out in the legal domain.

¹⁸⁴ H. Reynolds, "New Frontiers: Australia" in Havemann, *supra* note 5 at 129-140. David Carter from the University of Queensland described Henry Reynolds as a "moral historian" at the Australian Studies Association North America (ASANA) Annual Conference, Vancouver Canada, March 1, 2002.

¹⁸⁵ *Ibid.* at 129.

¹⁸⁶ *Ibid.* For a short and detailed background analysis of imperial policy to colonisation and the subsequent claim of *terra nullius* over Australia as a contextual framework and background for understanding native title see Reynolds, *supra* note 184 at 130-135. For a similar Canadian perspective see generally Harris, *supra* note 4.

There are two aspects of history that are of particular interest in this thesis: the realities of colonial history such as the dispossession of indigenous Australians, and oral tradition as a mechanism of recording and valuing indigenous perspectives of history. Before commencing any analysis it is therefore important to be attuned to the disparate relationships in discussing relationships to history within the legal paradigm.

History in Australia is dominated by themes of colonialism. Law was at the forefront of colonialism.¹⁸⁷ Harris has asserted that establishing English law was essential to the colonial project as it was the instrument through which Britain both “seized and justified its control of colonial lands,” where law and a belief in the rule of law were central to the colonial identity. That legal order dispossessed Aboriginal peoples.¹⁸⁸ History and relationships of indigenous and non-indigenous peoples have been the subject of interest in Canada, New Zealand and Australia.¹⁸⁹ There are different identifiable indigenous groups in each country, but the fact remains that the imposition of the rule of law, which is the hallmark of colonisation, was paramount in each colony.¹⁹⁰

The history of Australia however encompasses more than colonialism. The heritage and traditions of Aboriginal people are as much a part of Australian history as colonisation.¹⁹¹ The contemporary Australian landscape has been described in case law as “laced with the beautiful and intricate patterns of the Aboriginal Dreamtime mythology; [t]hat mythology is a priceless part of our national cultural heritage”.¹⁹² Only in the last century has

¹⁸⁷ Harris, *supra* note 4. In particular see at 186-202.

¹⁸⁸ Crispin J. in the Supreme Court of the Australian Capital Territory decision: *Re Thompson: Ex Parte Nulyarimma* (1998) 136 ACTR 9 [hereinafter *Re Thompson*] at paras 11-41 set out an extensive history of the dispossession of Aboriginal people from their lands following British settlement of Australia. See also *supra* note 18.

¹⁸⁹ See Havemann, *supra* note 5 at 1.

¹⁹⁰ For a thorough analysis of the importance of the rule of law to the colonial project see generally Harris, *supra* note 4.

¹⁹¹ Two cases prominent in the area of cultural heritage in Australia are *Bulun Bulun*, *supra* note 88 and *Tickner v. Bropho* (1993) 40 F.C.R. 183; 114 A.L.R. 409 [hereinafter *Tickner* cited to F.C.R.].

¹⁹² *Tickner*, *supra* note 191 at 211 per French J. The preservation of human cultural heritage as a public duty is recognised as an international norm. The concept is said to have originated in 19th Century France. See J.L. Sax, “Heritage Preservation as Public Duty: The Abbe Gregoire and the Origins of an Idea” (1990) 88 Michigan Law Rev. 1142. Several international bodies have recognized the importance of preserving and protecting the traditional society and culture of indigenous peoples. This cannot be ignored. See the United Nations Commission on Human Rights, report of the Working Group on Indigenous Populations, Draft Declaration on the Rights

recognition and respect for that heritage and tradition evolved. Lockhart J. in *Tickner v. Bropho* identified the beginning of history for Aboriginal people:

“... the Dreamtime is the beginning of time and knowledge. This was the period when the ancestral supernatural beings, who were part creature or plant and part human and who behaved as human personalities with all the strengths and frailties associated with people, broke through the crust of what is perceived in Aboriginal religion as the flat surface of the earth in darkness. They moved across the surface changing the form of the land, creating mountains, rivers, trees, waterholes, plains and sandhills, and making all living things: people, animals, birds and plants. They made all the natural elements: water, air and fire. They also made all the celestial bodies: the sun, the moon and the stars. When their work of creation was completed, the ancestral beings sank back into the earth and returned to their state of sleep. Aboriginal dreamings are the ancestral beings; they continue to reside in the living generations of Aboriginal people. Their spirits are passed on to their descendants. Groups of people who share the same dreamings... sets of people bonded by a common link to the particular dreaming. Dreamings... provide corporate and local identity to the Aboriginal people and furnish much of the spiritual foundation of traditional communal title to land.....”¹⁹³

The comparative perspective of Aboriginal people to history and the mechanism of recording and teaching that history were also evident in Canada in the Report of the Royal Commission on Aboriginal Peoples.¹⁹⁴ That Report expressly identified that the Aboriginal tradition of recording history is “neither, nor steeped in, the same notions of social progress and evolution” as the non-Aboriginal tradition. Moreover the Report identified the Aboriginal historical tradition as an oral one that involved legends, stories,

of Indigenous Peoples, UN Doc E/CN.4/Sub.2/1993/29/Annex I (23 August 1993), Arts. 7, 12, 13, 19, 25, 26, 28.

¹⁹³

Ibid. at 202.

and accounts handed down through generations in oral, not written form. The Report provided that the purpose of repeating oral accounts from the past “is broader than the role of written history in western societies” because it defines the culture and traditional beliefs of Aboriginal people.¹⁹⁵ It follows that Aboriginal culture is a legitimate and powerful component not only of Australian history, but also of Aboriginal people. Oral tradition for Aboriginal people records that culture.¹⁹⁶

One fundamental difference these passages highlight in the language and mechanisms of recording and valuing aspects of history or the past is the oral versus written tradition. The harsh realities of the past such as dispossession and the oral versus written tradition permeate decisions before the Courts in both Canada and Australia irrespective of whether they are native title applications or otherwise.¹⁹⁷

3.2 The guideposts of *Mabo* [No.2]

The decision in *Mabo* [No.2] provided the first real legal examination of Australia’s colonial history. The decision traced what can be described as the Australian monologue of discovery. The story settlers told themselves has been historically and methodically documented. The High Court in *Mabo* [No.2] began the process of rectification of that monologue.

In commencing that process Brennan J. specifically addressed the historical relationship between colonial law and contemporary Australian law. In his judgment Brennan J. recognised that Australian law is both the “historical successor of”, and an “organic

¹⁹⁴ Report of the Royal Commission on Aboriginal Peoples (1996), vol. 1 (Looking Forward, Looking Back), *supra* note 5 at 33.

¹⁹⁵ *Ibid.*

¹⁹⁶ Indigenous history, and secondly, its role in native title claims will be the subject of two new centres (June 2002) at the Australian National University [ANU], and James Cook University [JCU], respectively. The centre for Australian Indigenous History at ANU, and the Native Title Studies Centre at JCU may see the indigenous perspective emerge.

¹⁹⁷ For example *Cubillo*, *supra* note 5 saw written documents and oral recollections pitted against one another. Similarly in Canada *Woods v. Racine* [1983], 2 S.C.R. 173 a case about customary adoption exhibits a strong underlying issue of continuity.

development from” the law of England.¹⁹⁸ In doing so, he identified Australian law as a “prisoner of history”.¹⁹⁹ Yet in that identification of Australian law through the doctrine of reception he propounded the following words: “it is, nor now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies.”²⁰⁰

Secondly, Brennan J. observed that the laws of England, so far as they were applicable, became the laws of the Australian colonies.²⁰¹ This is qualified to the extent that, when the common law of England became the common law of the several colonies, the “theory which was advanced to support the introduction of the common law of England does not accord with our present knowledge and appreciation of the facts”.²⁰²

In essence, Brennan J. recognised the foundations of Australian law in English law yet specifically observed that the development of Australian law was no longer shackled to that law. What can be seen in these early passages is that without the ability to appreciate one story of creation and another of dispossession, the decision in *Mabo [No.2]* would have in fact never resulted. A similar recognition was apparent in the reasons of Deane and Gaudron J.J.²⁰³ These comments illustrate a subtle ability of the High Court to embrace, and visualise the significance of history.

However, Brennan J. did not encourage a disregard for the establishment of precedent. He specifically qualified the Courts ability to declare the common law of Australia.²⁰⁴ In particular he observed that the High Court was not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would “fracture the skeleton of principle” which gives the body of Australian law “its shape and internal consistency”.²⁰⁵ Therefore recognition by the common law of the rights and interests in

¹⁹⁸ *Mabo [No.2]*, *supra* note 1 at 29 per Brennan J.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.* at 38.

²⁰² *Ibid.*

²⁰³ *Ibid.* at 109 per Deane and Gaudron J.J.

²⁰⁴ *Ibid.* at 43 per Brennan J.

²⁰⁵ *Ibid.*

land of Aboriginal people in Australia would be precluded if recognition “fracture[s] a skeletal principle of our legal system”.²⁰⁶ Justice Brennan’s comments, pragmatically, ensure interpretation and recognition must be within the constitutional construct of the Courts powers – it cannot go beyond the Courts jurisdiction. This was not alarming, the Court is after all a body created and defined under the Constitution. It is unrealistic to expect more than its jurisdiction or authority allows. Despite this qualification, *Mabo [No.2]* provides persuasive authority that competing perspectives of history require embracing.

The High Court’s decision in *Mabo [No.2]* also shows that customary indigenous law has a role to play within the Australian legal system. Indeed the conclusion that native title survived the Crown’s acquisition of sovereignty was dependent upon the Court’s acceptance of “antecedent traditional laws and customs acknowledged and observed by the indigenous inhabitants of the land claimed”.²⁰⁷ Acceptance of traditional custom as the source of native title rights and interests informs the Courts’ attention to oral history and oral evidence.

The Court in that case also recognised that laws and customs of Aboriginal people may undergo change and that those native title rights and interests can change with time.²⁰⁸ *Mabo [No.2]* is authority for the proposition that a frozen rights approach to the assessment of native title rights and interests is to be avoided at common law. There are numerous passages in the judgments that specifically warn against a frozen approach. In particular Deane and Gaudron J.J. observed that the traditional law or custom was not “frozen as at the moment of establishment of a Colony”²⁰⁹ and there is “no question that indigenous society can and will change on contact with European culture”.²¹⁰

²⁰⁶ *Ibid.*

²⁰⁷ *Bulun Bulun*, *supra* note 88 at 248.

²⁰⁸ *Mabo [No.2]*, *supra* at note 1 at 70 per Brennan J; at 110 per Deane and Gaudron J.J; and at 192 per Toohey J.

²⁰⁹ *Ibid.* at 110 per Deane and Gaudron J.J.

²¹⁰ *Ibid.* at 192 per Toohey J. Justice Toohey was the Land Commissioner and in that role would have experienced, viewed and reviewed many Aboriginal peoples and their communities.

Justice Toohey observed that traditional title arises “from the fact of occupation, not the occupation of a particular kind of society or way of life”.²¹¹ So that as long as “occupation by a traditional society is established now and at the time of annexation, traditional rights exist.”²¹² Justice Toohey said there is no question that indigenous society can and will change on contact with European culture, but modification of traditional society in itself does not mean traditional title no longer exists.²¹³ In particular he said: “a traditional society cannot, as it were, surrender its rights by modifying its way of life.”²¹⁴ For Toohey J. a distinction should be noted between the “existence of traditional title and the nature of the title”. In particular his Honour observed that these two questions dictated two different lines of inquiry that “had been blurred in some instances, leading to confusion in the proof required to establish title”.²¹⁵

Brennan J. observed that it is “imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination”.²¹⁶ His Honour spoke of the “foundation of native title” indicating that it was merely the root of the

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.* Toohey J. relied upon *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1979) 107 D.L.R. (3d) 513 at 527-529.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.* at 184.

²¹⁶ *Ibid.* at 41-42 per Brennan J. International covenants prohibit distinction on the basis of race. See *Yarmirr*, *supra* note 7 at 196 per Kirby J. See also *Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168 at 204-206; *Gerhardy v. Brown* (1985) 159 C.L.R. 70 at 124-125. See also United Nations Charter 1945, Arts 1(3), 55(c), 56; Universal Declaration of Human Rights 1948, Art 2; International Convention on the Elimination of All Forms of Racial Discrimination 1965, Arts 1(1), 1(4), 2, 6 [(CERD) 660 UNTS 195 in force 4 January 1969, adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1969; 1975 Australia Treaty Series No 40; 5 ILM 352; Australia’s accession 30 October 1975]; International Covenant on Civil and Political Rights 1966, Art 2(1) [(CCPR) 999 UNTS 171, opened for signature 19 December 1966, 999 UNTS 171; 1980 Australia Treaty Series No 23; 6 ILM 368 entered into force 23 March 1976; Australia’s accession 13 November 1980]; International Covenant on Economic, Social and Cultural Rights 1966, Art 2(2) [(CESCR) 993 UNTS 3, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with Article 27]; and Declaration on Race and Racial Prejudice 1978, Art 9(1). International law is a “legitimate and important influence on the development of the common law”, particularly where the international law declares the existence of universal human rights. See *Mabo [No.2]*, *supra* note 1 at 42 per Brennan J. Similarly in Canada in interpreting the Charter, the SCC has frequently had regard to international instruments. See for example *R. v. Oakes* [1986] 1 S.C.R. 103 at 120-121; *Edmonton Journal v. Attorney-General for Alberta* [1989] 2 S.C.R. 1326 at 1374, 1377-1378.

tradition, that native title rights and interests were expected to evolve and change over time.²¹⁷ He contemplated the evolution of Aboriginal people and certainly did not advocate a frozen rights approach:

“Of course in time laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But as long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.”²¹⁸

The key words from that passage are “currently acknowledged and observed”. Moreover, his Honour said it was “immaterial” that the laws and customs “have undergone change” since sovereignty “provided the general nature of the connection between the indigenous people and the land remains”.²¹⁹ For Brennan J. where a group of Aboriginal people have continued to “acknowledge the laws and (so far as practicable) to observe the customs based on the traditions” of that group, where their traditional connection with the land has been “substantially maintained” the traditional community title of that particular group “can be said to remain in existence”.²²⁰ Similarly, within the spirit of the *Mabo [No.2]* decision the Explanatory Memorandum Part B which accompanied the Native Title Bill 1993 (Cth) expressly provided that the use of the word “traditional” in s. 223(1)(a) was not to be interpreted as meaning that the laws and customs must be the same as those that were in existence at the time of European settlement.²²¹

²¹⁷ *Ibid.* at 60.

²¹⁸ *Ibid.* at 61.

²¹⁹ *Ibid.* at 70.

²²⁰ *Ibid.*

²²¹ Explanatory Memorandum Part B, which accompanied the Native Title Bill 1993 (Cth) at 77.

The most notable example of the dynamics of history spilling over into the legal forum, beyond *Mabo [No.2]* was the case of *Nulyarimma v. Thompson*.²²² Two separate appeals were heard together because of their common assertion that the crime of genocide had occurred. The first matter involved an appeal from a decision of Crispin J. in the Supreme Court of the Australian Capital Territory to refuse the issue of warrants for the arrest of John Howard (the Prime Minister), Tim Fischer (the deputy Prime Minister), Brian Harradine, and Pauline Hanson in respect of informations claiming that they had committed the criminal offence of genocide in connection with the formulation of the Commonwealth government's native title "Ten Point Plan" and presentation and support of the Bill that, as extensively amended became the *Native Title Amendment Act 1998* (Cth).²²³ In the second appeal Mr. Kevin Buzzacott alleged genocide against the Minister for the Environment, the Minister for Foreign Affairs, and the Commonwealth of Australia for failing to apply to the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Committee for inclusion of the lands of the Arabunna Aboriginal peoples on the World Heritage List.²²⁴ The legal issue before the Court was the question of whether genocide was cognizable in Australian Courts in the absence of legislation.²²⁵

Justice Wilcox observed that anybody who considered the history of Australia since 1788 might readily perceive it appropriate to use the term "genocide" to describe the conduct of non-indigenous towards indigenous peoples.²²⁶ Similarly, he acknowledged the fact that many Aboriginal people "have been wiped out; chiefly by exotic diseases;" the loss of their traditional lands, and the "direct killing or removal of individuals, especially

²²² *Nulyarimma*, *supra* note 5.

²²³ A registrar at the Magistrates Court of the Australian Capital Territory [hereinafter the ACT] declined to issue the four warrants on the ground that law of the ACT did not recognise the offence of genocide. The appellants then applied to the Supreme Court of the ACT for an order nisi requiring the Registrar to show cause why an order should not be made. Crispin J. refused in *Re Thompson*, *supra* note 188. The appellants further appealed to the Federal Court of Australia.
²²⁴ The area was around Lake Eyre in the North of South Australia.

²²⁵ The term "genocide" originates from the Polish jurist, Dr. Raphael Lemkin from the ancient Greek word "genos" (race or tribe) and the Latin word "cide" (killing). Genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is a crime under customary international law over which nation States may exercise universal jurisdiction. Customary international law is not conventional law, which is the law of treaties: *Dietrich v. The Queen* (1992) 177 C.L.R. 292.

children” and those that have survived have “lost their traditional way of life and much of their social structure, language and culture.”²²⁷

Yet, like all matters before the Courts, Wilcox J. was required to consider the legal issues in the presented case.²²⁸ In the decision at first instance, Crispin J. was also bound by the same constraints. He recognised and accepted that British colonisation had grave consequences for Aboriginal people.²²⁹ He noted the unchallenged dominion until colonisation and then the “wholesale destruction” and “wholesale usurpation” of land.²³⁰ The difficulty for Crispin J. at first instance and the Full Court of the Federal Court in the appeal was the impossibility of fixing any particular person or institution with an “intent” to destroy Aboriginal people. This was the only other case besides *Mabo [No.2]* where the Court was fully prepared to acknowledge historical reality as it affected Aboriginal people. The Court was asked to validate a history, but in this instance there was no competing interpretation. All of the judges of the Full Court were able to view the real history of Australia and unmask the mythology of discovery. Even Merkel J. in dissent was aware of the historical reality and had no hesitation in recognising the dispossession and alienation of Aboriginal people from their land.²³¹

Three judges of the case agreed that genocide was a crime under international customary law, but Whitlam and Wilcox J.J. did not think, unlike the dissenting Merkel J., that in the absence of appropriate legislation it was cognizable in an Australian Court. Nevertheless the case illustrates that Australian justices are demonstrating an ability to visualise the darkest aspects of Australia’s history and proceed within the parameters of the *Mabo [No.2]* decision.²³²

²²⁶ *Nulyarimma*, *supra* note 5 at 624 per Wilcox J.

²²⁷ *Ibid.*

²²⁸ *Ibid.* at 626.

²²⁹ *Re Thompson*, *supra* note 188 at para 11.

²³⁰ *Ibid.* at paras 11, 32.

²³¹ *Nulyarimma*, *supra* note 5 at 638-639 per Merkel J.

²³² The applicants ultimately sought special leave to appeal to the High Court on the importation of customary international law into municipal law. Leave was refused per Gummow, Hayne and Kirby J.J. noting they expressed no view on the correctness that the crime of genocide was not part of the common law of Australia and that even if it was it had not been shown that the Full Court of the Federal Court erred in deciding that it was not arguable that conduct alleged to constitute

The most informative illustration of the application of the principles espoused by Brennan J. in *Mabo [No.2]* and a broad outlook on the part of the Court in respect of the dynamics of law, history and oral tradition is the August 2001 decision of von Doussa J. in *Chapman*.

The Chapmans sued for the loss in value of a marina development on Hindmarsh Island in South Australia as a consequence of the Minister of Aboriginal and Torres Strait Islanders making a declaration under s. 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) [hereinafter the HPA] in 1994.²³³ That declaration banned the construction of a bridge from Goolwa to Hindmarsh Island for a period of twenty-five years because of the significance of secret womens' knowledge within Aboriginal tradition to the area where the bridge was to be constructed.²³⁴

Two of the respondents reported on the significance of the area according to Ngarrindjeri people. It was identified in broad terms in the reports, but more detail about it was contained in envelopes attached to one of the reports.²³⁵ The restricted womens' knowledge described a spiritual belief of creation and procreation handed down from mother to daughter that was drawn from the landscape – a relationship with the land. The applicants alleged that the restricted womens' knowledge commonly known, as "womens' business" was not a genuine Ngarrindjeri tradition. Upon the evidence before him von Doussa J. concluded that the restricted womens' knowledge was not fabricated

genocide falls within the definition of genocide in international law. See *Nulyarimma & Ors v. Thompson* C18/1999, and *Buzzacott v. Hill & Ors* C19/1999 application for special leave to appeal to the High Court, 4 August 2000 at 16.

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There were five respondents.

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The declaration was made on an application by the Aboriginal Legal Rights Movement [hereinafter ALRM] on behalf of the Lower Murray Aboriginal Heritage Committee to protect an area included in the proposed development. Three Aboriginal sites in April 1994 were identified as at risk. They were the archaeological sites of the original Aboriginal Township, Katunkald, extending along the Goolwa foreshore, the former township site on the Hindmarsh Island side of the Goolwa channel Rawaldarang. The third, and the most important and controversial site was the "Meeting of the Waters" - the Goolwa channel around Goolwa and the Murray Mouth. The bridge was finally constructed and opened to traffic on 4 March 2001. (A Royal Commission found the women's business was fabricated and construction commenced. The proceedings before von Doussa J. were a subsequent claim by the developers to recover alleged loss in the value of a marina development on Hindmarsh Island).

and that it was part of genuine Aboriginal tradition. How his Honour arrived at that conclusion is significant in terms of relationships to history in two ways. The fact that the secret knowledge was held by one person and secondly was disclosed at the “eleventh hour” were factual situations reviewed by the trial judge from both the applicants standpoint and also from within the Aboriginal paradigm. A contextual approach to the evidence was adopted.

Justice von Doussa recognised the common understanding of the witnesses in this case was that traditions, observances, customs and beliefs, particularly in Aboriginal communities that have been removed from their traditional lands and have become urbanized, may be known only to a few people. It was also common ground that the traditions controlling the transmission of traditional information may result in that information not being passed on until the old age of the person possessing it.²³⁶ In those circumstances it was not difficult for the trial judge to envisage that where only a small group holds information, that “sudden illness or tragedy or other circumstances” may reduce the number to one. The area could still qualify as a significant Aboriginal area even if all the descendant members of a community who once were the native title holders of the area had died if before that occurred the Aboriginal tradition that rendered the area significant had been appropriately recorded, and the tradition was still acknowledged and respected by other members of the Aboriginal community.²³⁷

The fact of late emergence of the secret womens’ business was also indicative of the contextual approach by the trial judge. In addressing the applicants claim that the late emergence of any secret womens’ knowledge indicated fabrication, the trial judge had regard to the Aboriginal tradition and perspective. In particular von Doussa J. observed that to the “euro centric mind” the late disclosure of information that supports a discloser will be “viewed with suspicion”.²³⁸ Yet he simultaneously appreciated that often under Aboriginal custom not all information is “open”:

²³⁵ That report was marked “to be read by women only”.

²³⁶ *Chapman*, *supra* note 9 at para 277.

²³⁷ *Ibid.* at para 276.

²³⁸ *Ibid.* at para 333.

“Much cultural information is surrounded by restrictions on disclosure. Some cultural knowledge relating to sacred beliefs is highly secret. Some, though sacred, may be revealed in part. The concept of graded secrecy, that is layers of knowledge is recognized, where outer layers may be widely known, but inner layers, including knowledge as to the significance of the belief to the culture may be known to only a very small number The transmission of restricted cultural knowledge is likely to be strictly governed by traditional customs and a system of respect which delineate by whom, to whom, and in what circumstances the knowledge may be revealed. The phenomenon of eleventh hour disclosure when all means short of disclosure have failed to protect an Aboriginal tradition is also recognized.”²³⁹

The trial judge held in respect to the late emergence of the tradition, that such final hour release was not necessarily indicative of fabrication. In fact, late emergence was to be expected in the case of “genuine sacred information of importance”. Notwithstanding those initial comments, von Doussa J. was of the opinion that the late emergence demanded close attention.²⁴⁰ The explanation given by the proponents of the knowledge was described as complex.²⁴¹ The trial judge considered a history that included the “dispersal of the Ngarrindjeri people from their traditional lands over the last 150 years; their integration first into mission life and Christianity, and then into the general community”.²⁴² It revealed “many Ngarrindjeri people of today no longer have knowledge of the traditional practices and cultural beliefs of their forbears”.²⁴³ Yet it was clear to the trial judge that “traditional cultural information remained” with some people, “although not in a comprehensive form”.²⁴⁴ As a consequence the trial judge found it to

²³⁹ *Ibid.* at para 333.

²⁴⁰ *Ibid.* at para 337.

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

be understandable that only a few Ngarrindjeri women would now know aspects of their oral history.

In determining the late emergence of the womens' business and alleged fabrication the trial judge showed an ability to appreciate and visualise the realities of history, while having regard to and respect for the Aboriginal perspective within the role of the Court. He respected it by appreciating and assessing the late emergence of the fact within the appropriate domain – that was the Aboriginal perspective. The case is most informative on the link between history and the evidentiary issues it encompasses. The case illustrated that the matters before the Court that involve an Aboriginal component or proponent are really about the “impact of European settlement, dispossession and the consequent abandonment of a traditional lifestyle”, upon indigenous rights and interests.²⁴⁵

In *Chapman*, the flexibility of the Courts approach to the rules of evidence is also informative. The trial judge was confronted with other significant evidentiary difficulties. The evidence of the secret womens' business was heard orally and recorded in secret envelopes appended to a Report before the Court. The difficulties of competing evidence, from different sources such as written, oral and orally transposed, confronted the trial judge. Anthropologists, the Ngarrindjeri people and the wider non-indigenous community all held disparate views. One of the interesting things about this case was that there were several competing Aboriginal perspectives. The approach of von Doussa J. is testament to the fact that where it is necessary to decide primary facts or to prefer one expert opinion over another, the Aboriginal perspective has an equal right to inform the bench, and secondly, that evidence must be evaluated within its own paradigm. With respect to the Aboriginal tradition held by the Ngarrindjeri women, von Doussa J. ordered that the evidence be received in a Court closed to the public and to all men.²⁴⁶ In addition the trial judge was faced with two Ngarrindjeri women presenting to

²⁴⁵ *Yorta Yorta*, *supra* note 8 at 254 per Black C.J.

²⁴⁶ Save for the male Judge whose role and presence was an inevitable part of the exercise of judicial power under Chapter III of the Constitution as recognised by the Court in *Western Australia v. Ward* (1997) 76 F.C.R. 492 at 496.

the court from diametrically opposed positions on the secret womens' business. In considering the attacks on one woman's evidence the trial judge was aware of the difficulties many of the Ngarrandjeri witnesses encountered during their cross examination in understanding the nuances of questions posed to them.²⁴⁷ In considering the problems from the Aboriginal perspective and adopting a flexible approach to the rules of evidence the trial judge was not persuaded by the extensive criticisms to reject the evidence.

Justice von Doussa illustrated that same contextual approach and respect for Aboriginal tradition in admitting oral and written evidence of customary law in *Bulun Bulun v. R. & T Textiles*²⁴⁸ [hereinafter *Bulun Bulun*]. That case concerned the copyright of a painting of cultural significance, which was reproduced without consent. The proceedings arose out of the importation and sale in Australia of printed clothing fabric that infringed the copyright in an artistic work "Magpie Geese and Water Lillies at the Waterhole". That work identified matters that were sacred and important to the Ganalbingu people and their heritage. The case raised important and difficult issues regarding the protection of the interests of Aboriginal people in their cultural heritage. Much of the evidence in the proceedings related to customary rights and obligations recognised and observed by the individual members of the Ganalbingu people and the group as a whole. The admissibility of that evidence and the use to which that evidence of collective ownership of artistic work by a tribal group may be put, and customary law per se, was significant for these purposes because it shows the importance of a contextual approach. Mr Bulun Bulun successfully presented to the Court the significance and importance of the heritage of his people depicted in the artwork. Much of the evidence was oral and described Ganalbingu customary law. Justice von Doussa accepted the oral evidence of sacred traditions held by the Ganalbingu people. He also personally viewed the Waterhole and other areas spoken about. In assessing the oral evidence of sacred sites, and the visual evidence presented to the Court within the paradigm of the Ganalbingu people, the significant indigenous perspective emerged before the Court.

²⁴⁷ Chapman, *supra* note 9 at para 434.

²⁴⁸ *Bulun Bulun*, *supra* note 88.

When that perspective emerges and is reviewed and analysed as it was in this instance within its own paradigm the Aboriginal tradition is respected and valued. At that point a meritorious appraisal of the issues of the case, in this instance the infringement of a communally held copyright can be fairly determined in accordance with legal precedent.

The guideposts from *Mabo [No.2]* and decisions such as *Chapman*, *Nulyarimma*, and *Bulun Bulun* reflect the spirit of the *Mabo [No.2]* decision, and illustrate the importance of the Court's ability to acknowledge both a story of creation and another of dispossession and simultaneously accept and analyse evidence of the Aboriginal perspective within its own paradigm. Aboriginal perceptions of history and tradition are significant when determining the existence of indigenous rights and interests. Evidence before the Court that involves an Aboriginal aspect or Aboriginal tradition "should not be whether, judged by the norms and values of our secular culture or our religions, the sites are important, but whether they are important to Aboriginals in terms of the norms and values of their traditional culture and beliefs".²⁴⁹ In essence, the "issue is not whether we can understand and share the Aboriginal beliefs, but whether, knowing they are genuinely held we can therefore respect them".²⁵⁰ These cases are significant because they highlight the importance of contextually accepting and reviewing evidence placed before the Court. A contextual approach that reviews evidence within its own paradigm is essential. The guideposts of *Mabo [No.2]* demand an approach that accords full respect to indigenous perspectives before the law.²⁵¹

3.3 The bias of history in native title claims

The Aboriginal perspective of history and the evolution of Aboriginal culture are emerging before Australian Courts in the adjudication of native title claims. Yet in native title cases the Courts are exhibiting a limited deference to the history of Australia, contrary to that espoused by *Mabo [No.2]* and subsequent cases such as *Chapman* and

²⁴⁹ Hon J.H., Wootten A.C., Q.C., Proposed Junction Waterhole Dam, Alice Springs, Report (Sydney: A Report to the Minister for Aboriginal Affairs under s. 10(4) *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), 1992) at para 7.1.10.

²⁵⁰ *Ibid.*

²⁵¹ *Mabo [No.2]*, *supra* note 1 at 331-332.

Nulyarimma. The Courts are not showing an ability to appreciate the historical context and the same all embracing contextual approach to the oral tradition and evidence of Aboriginal people. A contextual approach gives equal respect to both Aboriginal and non-aboriginal experiences. Some deference is granted to the Aboriginal claimants at the early stages of determination of their claims but not throughout the proceedings.

It was most acute in *Yarmirr*. That case revealed the ability of the High Court to go beyond the common law at the low-water mark, but not beyond the Magna Carta. For the majority the case required a detailed consideration of the legal status of the seas and seabed in the claimed area.²⁵² That involved an historical journey through Imperial, colonial, State and Federal executive and legislative authority. In the identification of the sovereign rights and interests over the sea and having regard to history, it was necessary to distinguish between external and internal sovereignty. The majority found that at no time before Federation in 1901 did the Imperial authorities assert any claim of ownership to the territorial seas or seabed.²⁵³ Prerogative rights of the municipal Crown in relation to the territorial sea were limited. Those limitations were the public right of fishing in the sea and in tidal waters, and the public right of navigation.²⁵⁴ Whatever the origins of those rights, their existence was not disputed.²⁵⁵

The majority also considered the history of the internal regime. Northern Territory law was found to have been applicable in the area of the coastal waters since September 1985. In 1990 Australia extended the limit of its territorial sea from three miles to twelve. The majority found that right and title vested under statute could not be full beneficial ownership as such ownership would have been inconsistent with the public right to fish and navigate. Those rights qualified the sovereign rights to the sea.²⁵⁶ There could not be absolute or unqualified ownership vested in the Northern Territory because such ownership would be inconsistent with the international obligations of Australia in the Convention on the Territorial Sea and the Contiguous Zone to afford innocent passage to

²⁵² *Yarmirr*, *supra* note 7 at 122 per Gleeson C.J., Gaudron, Gummow, and Hayne J.J.

²⁵³ *Ibid.* at 135.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

ships. The majority held that there was no law, past or present concerned with the territorial sea that was inconsistent with the common law of Australia recognising native title rights and interests in the sea or seabed.²⁵⁷

Yet the Yarmirr claim foundered on the Magna Carta. In 1215 King John confirmed a public right to fish in tidal waters. There was also a public right of navigation in coastal waters. The process of colonisation, “however fair it may have been”, transposed those laws to Australia and ended any exclusive Aboriginal control of fishing and access to traditional seas. The Magna Carta washed away exclusive use by the claimants. At the same time, however, the Court did confirm the right of the Aboriginal claimants to fish, but it was a shallow victory because in the loss of exclusivity their rights were subverted to commercial fishing rights.

The Court recognised the traditional connection with the claimed land and sea, yet at the same time the exclusivity of that traditional connection was denied. One very significant fact to be remembered throughout any claim (particularly to sea) is that even if it is correct to say that the common law and custom has or had no application in the particular area that has no effect upon, and says nothing of, whether traditional law and custom had or has application.²⁵⁸ Ironically this was a point made by the majority.²⁵⁹ Yet at the same

²⁵⁶ *Ibid.* at 138.

²⁵⁷ *Ibid.* at 139.

²⁵⁸ A point duly acknowledged by the majority in *Yarmirr*, *supra* note 7 at 128. Although the majority failed to consider the decisions of *Moore v. Attorney-General* [1929] I.R. 191 and on appeal *Moore v. Attorney-General* [1934] I.R. 44. That case involved a claim to a several fishery and one issue was the reception of the common law in Ireland – a conquered country in the eyes of the common law. It will be significant in the Haida Nation’s Aboriginal title claim to the Haida Gwaii and surrounding areas in British Columbia, Canada, to consider these cases and whether the common law was introduced incrementally or universally upon conquest or settlement. In addition Canada needs to address the application of the decision in *R v. Keyn* (1876) 2 Ex D 63 [hereinafter *Keyn*]. Interestingly the principle in *Keyn* has also been accepted and applied in Canada in *Re Offshore Mineral Rights of British Columbia* [1967] S.C.R. 792 at 804-805 and *Re Newfoundland Continental Shelf* [1984] 1 S.C.R. 86. In *Re Offshore Mineral* the SCC was asked to provide an advisory opinion on ownership over the seabed and subsoil. Central to the Courts reasoning was the decision in *Keyn*. What is interesting though is given the majority in *Yarmirr* whether a native title claim to sea will see a different interpretation to *Keyn* in Canada. The Haida Nation in British Columbia has filed the first claim to sea and the seabed in Canada (March 2002). It is more interesting given the Alaskan cases and North American authorities to date have refused to recognise claims of Aboriginal title rights and interests in the sea, seabed and subsoil. See *Re Offshore Mineral Rights of British Columbia*, at 814, 815-816; *United States v. California* 332 US

time one must acknowledge the Court's conundrum: the balancing of international law, public rights to fish, a right of innocent passage, native title rights and Crown sovereignty were all implicated.

It was the colonial history of Australia that washed away Aboriginal peoples relationship and traditional links with the land. They were ousted from their land. Judges understand that, but the different interpretations of that history is revealed in the division between Kirby J., who found the Aboriginal peoples ability to defend the area from the Macassan traders and other indigenous people supported exclusivity, while the majority allowed that Aboriginal evidence of history to be trumped with the written document of the Magna Carta.

A similar approach to history is evident in *Ward*. The decision of the majority, Beaumont and von Doussa J.J., illustrated a contextual approach at the initial stage of inquiry in the native title claim.²⁶⁰ Extensive transformation of the claimed area occurred yet for the majority the requisite connection could be maintained despite such massive changes and diverse impact on Aboriginal people.²⁶¹ More often than not the events of history have dictated the connection of Aboriginal people to areas of land. Settlers have transformed areas of Australia through man-made lakes, and the establishment of pastoral country. Historically it has been difficult for Aboriginal people to maintain physical connection and presence at all times on claimed areas. The majority, like the trial judge, was attuned to these realities. In particular the majority observed that the "degree of dislocation and decimation caused by the arrival of settlers and miners" in the claimed area could not be underestimated in its effect of dispossessing Aboriginal people and "fracturing their communities".²⁶² The majority observed that in some areas of

19 (1947); *United States v. Louisiana* 339 US 699 (1950); *United States v. Texas* 339 US 707 (1950) and *United States v. Maine* 420 US 515 (1975). In the United States the Federal Court of Appeals for the Ninth Circuit has held that the holders of Aboriginal title have no rights over the territorial sea, seabed or sub soil. See also M. D. Walters, "Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada" (1998) 23 *Queens L.J.* 301.

²⁵⁹ On appeal to the High Court there was an unchallenged finding of fact that traditional laws and customs were and are presently observed in relation to the claimed area.

²⁶⁰ North J. in dissent agreed with this part of the majority decision.

²⁶¹ *Ward*, *supra* note 12 at 382-383 per Beaumont and von Doussa J.J.

²⁶² *Ibid.* at 355, 382-383.

“concentrated settler activity” the “reasonable inference” was that Aboriginal presence became “impracticable”. They opined that the evidence before the trial judge painted a “clear picture” of it being impracticable following European settlement for Aboriginal people to “maintain a traditional presence” on some areas of the claimed land. Having regard to these historical facts the majority found that it did not necessarily follow that the surviving members of the Miriwung and Gajerrong communities did not “substantially maintain their connection with their land”.²⁶³ Physical occupation of the claimed area was not a necessary requirement for the proof of continuing connection with the land, rather, whether or not a spiritual and cultural connection with the land was maintained in other ways was a question of fact, “involving matters of degree, to be assessed in all the circumstances of a particular case.”²⁶⁴ For the majority it was a contextual question of fact.

Yet simultaneously the Miriwung and Gajerrong were defeated by the Court’s problematic interpretation of history. It seems that interpretation of history permitted the Miriwung and Gajerrong at the early stage of the native title determination to win the battle, but ultimately parts of their claim were defeated. Some native title rights and interests were extinguished. The majority, by giving a particular interpretation of extinguishment, have by necessary implication validated colonial settlement and development. It privileges settler economic interests over Aboriginal interests and in this sense contributes to, rather than redresses the unjust dispossession.

A frightening pattern emerges from the decisions of the majority in *Yarmirr*, and *Ward*. At the first stage of the inquiry the Courts are visualising the path of history, considering the question of fact posed by s. 223(1)(a) of the NTA within the contextual framework of colonialism and the blows it may have dealt Aboriginal people. Yet simultaneously, at

²⁶³ *Ibid.* at 382.

²⁶⁴ *Ibid.* at 383. For example the fact that two man made lakes, Lake Kunnunurra and Lake Argyle in that case had been created did not necessarily sever the connection. The majority found that by continuing to acknowledge and observe traditional laws and customs (involving ritual knowledge, ceremony and customary practices) the spiritual relationship with the land could be maintained. See also the majority at 384.

the second stage of the inquiry, in the consideration of the issues of extinguishment (or inconsistency) the history of land dealings defeats the claimants.

An historical imbalance imbues the native title decisions. The issue of whether that historical imbalance gives rise to a fiduciary duty emerges. A claim that a fiduciary obligation was owed by the Crown to Aboriginal people on the basis of an historical relationship was rejected in *Thorpe v. Commonwealth [No.3]*²⁶⁵ [hereinafter *Thorpe*] and *Nulyarimma*.²⁶⁶ However, those cases were not concerned with native title interests.²⁶⁷ *Thorpe* concerned claims of genocide and an assertion of indigenous sovereignty. Accordingly, whether the Crown owes a fiduciary duty to Aboriginal people in terms of native title remains an open question.²⁶⁸ The elements that give rise to a recognized duty are arguably present; fragility of native title represents vulnerability. The NTA is also testament to that fragility. It is primarily beneficial legislation to protect native title interests. Moreover the categories of fiduciary are not closed in Australia.²⁶⁹ The bias of history emerging from the judicial interpretation of history, in native title claims requires a focus on evidentiary aspects of the Court as much, if not more, than the recognition at common law of an existing historical relationship of fiduciary.

²⁶⁵ *Thorpe*, *supra* note 6 at 777 per Kirby J.

²⁶⁶ *Nulyarimma*, *supra* note 5 at 677ff per Merkel J.

²⁶⁷ Fiduciary duty is a key aspect of s. 35 in Canada. See *Guerin*, *supra* note 131. In the United States of America see *United States v. Mitchell* [No.2] (1983) 463 US 206. It remains a key issue in Australian litigation, and awaits a definitive answer by the High Court. The Wik and Thayorre peoples in *Wik*, *supra* note 51 asserted a fiduciary duty, but it was not necessary in that decision to determine the issue. See the discussion of Brennan C.J. in that case at 82-83, 96. Those comments are made in considering the *Land Act 1910* (Q). Previously the High Court rejected a claim that a fiduciary obligation arose in relation to s. 44(2) of the *Aboriginal Land Rights Act 1976* (Cth) in *Northern Land Council v. The Commonwealth* (1986) 161 C.L.R. 1; 64 A.L.R. 493. That was a statutory land claim. A native title interest may be different. See also *Kruger v. Commonwealth* (1997) 190 C.L.R. 1, 146 A.L.R. 126; *Thorpe*, *supra* note 6; and *Cubillo*, *supra* note 5 and *Nulyarimma*, *supra* note 5. The question of whether such an obligation arises in relation to native title is still to be definitively answered by the High Court. There was a discussion in *Mabo [No.2]*, *supra* note 1 at 60 per Brennan J., with whom Mason C.J., and McHugh J. agreed. See also at 196 per Toohey J. who noted the fiduciary obligation arises from the inalienability of native title, except to the Crown. See also *Bodney*, *supra* note 105 where the argument encompassed whether the Crown in right of the State or the Commonwealth owed a general fiduciary duty to indigenous people when dealing with land over which they held native title.

²⁶⁸ *Thorpe*, *supra* note 6 at 777 per Kirby J.

3.4 The evidentiary aspects

There are several aspects to the judicially articulated bias of history and its impact on the Courts' ability to accept and review evidence.²⁷⁰ First, it is compounded by the enormity of proceedings in native title claims, and the resultant evidentiary difficulties. Pejoratively tied to these compounding evidentiary issues is the creation of a cultural gulf in the Court. That cultural gulf emerges in the application of a frozen in time approach to native title rights and interests.

3.4.1 The nature of native title proceedings

The legal process for such claims is governed by the NTA (or the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)). *Ward* was heard in March 2001, but judgment has not yet been given. *Anderson* in September 2001 also awaits judgment. The whole process can take years. In the ten years since *Mabo [No.2]* only 30 determinations that native title continues to exist have been made.²⁷¹ See appendix one for an outline of the number of native title claims in that ten-year period. There are a further 589 active native title applications pending, a substantial number of which are most likely in mediation. All of the native title applications allow the claimants the right to negotiate any proposed use of the claimed land pending final determination of the native title claim. Furthermore, claimants may object whenever "expedited procedure" provisions of the NTA are invoked to fast track the grant of a mining lease or other permit to use the claimed land.²⁷²

²⁶⁹ *Hospital Products Ltd v. United States Surgical Corporation* (1984) 156 C.L.R. 41, 55 A.L.R. 417.

²⁷⁰ See also *Marshall*, *supra* note 171 at 490-492 per Binnie J.

²⁷¹ Of these 14 are in the Torres Strait; four in Queensland; two in New South Wales; three in the Northern Territory (one overlaps with Western Australia) and seven in Western Australia. This information can be obtained from the NNTT.

²⁷² There have been 587 objections to "expedited procedures, some 479 in Western Australia and 108 in the Northern Territory.

Progress is too slow. The progress of native title claims in the last ten years for example from some 9 square kilometres in *Mabo [No.2]*, to 7,900 square kilometres in *Ward*, compounds the difficulty. The scope and potential impact of such proceedings accompanied by the difficulty of language and evidence are at the forefront of the problem.

Native title determinations under the NTA regime are “necessarily lengthy and complex”,²⁷³ and “long and expensive not only in economic but in human terms as well”.²⁷⁴ These claims are huge, trials are long, and costs are exorbitant. The Federal Court is required to hear evidence from many places of the claim area. Social scientists such as anthropologists, archaeologists, linguists and historians all have a role in researching and producing the genealogies, historical reports, and other expert reports necessary to make out the claim.

The appeal in *Ward* was heard in Perth, Western Australia, and lasted for 15 days, making it one of the longest appeals ever before the Federal Court. The written submissions ran into some seven thousand pages. The hearing of *Yorta Yorta* went for 144 days and encompassed 201 witnesses and 48 statements. It is recorded in some 11,664 pages of transcript. Similar statistics are evident in Canada. For example in *Delgamuukw*, the trial judge’s decision was some 440 pages and the actual trial went for 374 days.²⁷⁵ Even the High Court struggles with the volume of the matters on appeal.²⁷⁶ This problem of volume in native title matters and the process required for proof is endemic to native title litigation. The proceedings are further complicated by the existence of State and Commonwealth governments and third parties who have, almost always, opposite views and priorities.

²⁷³ *Yorta Yorta*, *supra* note 8 at 247 per Black C.J.

²⁷⁴ *Delgamuukw*, *supra* note 78 at 1123.

²⁷⁵ The claim was issued in 1984, but was not before the SCC until 1997. It was necessary for the Aboriginal people to reframe their claim as Aboriginal jurisprudence was developing while their claim was progressing. The claim was originally for ownership of the territory and jurisdiction over it. At the SCC it was transformed into a claim for Aboriginal title over the land.

²⁷⁶ See *Yorta Yorta* special leave transcript, *supra* note 79 at 17. McHugh J. warned that the Full Court of the Federal Court is “speaking generally, the last court for these matters; [t]his Court just does not have the resources to be taking on large native title cases.”

Aboriginal customary rights and obligations are not easily “explicable and definable” in terms of ordinary western jurisprudential analysis or common law concepts.²⁷⁷ Empirical proof is hard for Aboriginal proponents. The content and form of Aboriginal beliefs in issue cannot be proven, or for that matter disproved by empirical evidence.²⁷⁸ There are many evidentiary issues raising concerns and problems in litigation with an indigenous proponent or component.²⁷⁹ To date trial judges such as Olney J. in *Yorta Yorta*, and *Yarmirr*, and Lee J. in *Ward*, have been deciding these hard evidentiary issues, with volumes of material far beyond that seen by either the Full Court of the Federal Court or the High Court.²⁸⁰ More impressively, they have had less guidance. Except for the principles enunciated by *Mabo [No.2]*, *Wik*, and *Fejo*, and those contained in the NTA, they have been dealing with novel concepts on an unprecedented scale.

3.4.2 *The inherent evidentiary difficulties*

Integral to that sheer volume is the fact that material evidence where both sides are diametrically opposed on some point of history or priority is being presented to the Court. As a result native title claims are imbued with inherent evidentiary difficulties arising not only from the volume of material before the Courts but also from disparate relationships to history, culture and the fact that there is an oral tradition. This strategic theme of relationships to history and the evidentiary difficulties it encompasses surfaces most poignantly in the evolution of Aboriginal people. Lack of sensitivity to the oral tradition has the potential to freeze native title rights and interests at the time of assertion of Crown sovereignty, thereby creating a cultural gulf in the Courtroom and beyond.

²⁷⁷ *Delgamuukw*, *supra* note 78 at 1065-1069. Cited in *Bulun Bulun*, *supra* note 88 at 248.

²⁷⁸ Empirical evidence is used as a description of traditional common law forms of written evidence such as documents, statistics, and scientific data and published literature.

²⁷⁹ See *Chapman*, *supra* note 9 and also *Daniels v. Western Australia* [1999] FCA 1541 (unreported) Nicholson J. These cases highlight the significance of other evidentiary principles in native title litigation. For example in *Daniels* the protection of client legal privilege arose because the State of Western Australia sought access to an anthropologists notes prior to the expert testimony being given, so as to use it for cross examination of the Aboriginal witnesses.

²⁸⁰ Except perhaps by the Full Court of the Federal Court in *Ward*, *supra* note 12.

Nowhere is the paradox of relationships to history more apparent than the decision of the Full Court of the Federal Court in *Yorta Yorta*. Branson and Katz J.J. comprised the majority while Black C.J., wrote an exemplary minority decision. The treatment of historical sources marked an important point of difference between the judgments and began the first formal battle over the level of rigour to be applied to the assessment of historical facts and the value of oral evidence. The point to be made from the outset is that competing relationships to history in *Yorta Yorta*, led to large questions as to the proper approach to the evaluation of history and evidence as a whole.²⁸¹

In *Yorta Yorta* the trial judge refused the Yorta Yorta peoples native title claim because he found as a fact that by the close of the 19th century the impact of settlement in the claimed area was such that the forbears of the claimants had lost their traditional connection with the land. Consequently, the traditional laws and customs were no longer observed or acknowledged. Mr Edward Micklethwaite Curr [hereinafter Curr] was one of the first squatters to occupy an area of the claimed land.²⁸² He lived there from 1841 to 1851 recording his memoirs and notes in: *Recollections of Squatting in Victoria, then called the Port Phillip District (from 1841-1851)*.²⁸³ Some years later that material was used to compile a four volume epistle in *The Australian Race: its origin, languages, customs, place of landing in Australia and the routes by which it spread itself over that continent*.²⁸⁴ The trial judge was heavily dependent upon the writings of Curr throughout his reasons. For Olney J. the most “credible source” of the traditional laws and customs from which two of the claimants forbears came was to be found in the writings of Curr.²⁸⁵ Yet some fifty-six witnesses of Aboriginal descent, two of whom were not part of the claimant group gave evidence at the hearing. The trial judge recognised the oral testimony of the witnesses from the claimant group as a “further source” of evidence but being based upon oral tradition passed down through many generations extending over a

²⁸¹ See *Yorta Yorta* special leave transcript, *supra* note 79 at 18 per John Basten Q.C.

²⁸² Curr was born in Hobart in 1820. He studied in England and on return to Australia he managed his father’s pastoral stations in northern Victoria. Curr became interested in the local Aboriginal people and began collecting information about them. His collection grew considerably and culminated in two books.

²⁸³ First published in 1883 (Melbourne: George Robertson).

²⁸⁴ First published in 1886 (Melbourne: Victorian Government Printer).

²⁸⁵ *Yorta Yorta Aboriginal Community v. State of Victoria* [1998] FCA 1606 (unreported) at para 106.

period in excess of two hundred years, less weight should be accorded to it than to the information recorded by Curr.

One of the major problems for the trial judge was the need to connect the “known ancestors” with the people whose traditional laws and customs at and before the time of European contact entitled them to the rights of ownership, possession, occupation and use claimed by their descendants. The problem was highlighted for the trial judge by the fact that neither Curr’s writings, nor a missionary’s journal, identified any individual Aboriginal with whom either made contact who could be connected with any of the named ancestors. Yet the Aboriginal witnesses in this case provided oral evidence about that connection. The trial judge concluded that there was no evidence from which any relevant inference could be drawn to establish a connection between the claimants and the indigenous inhabitants of the claim area as at 1788 (assertion of Crown sovereignty). Curr did provide some evidence of the existence of various groupings of Aboriginal people who were distinguishable one from another by such factors as the names by which they identified themselves, the territory they habitually occupied and the languages they spoke. However, Curr did not have any special qualifications or training that fitted him for the task of recording or interpreting the information he acquired.

The majority on appeal were of the opinion that the findings made by the trial judge were open to him and that no case was made to disturb that finding. The learned Chief Justice was in the minority and held that the trial judge was in error by applying a restrictive approach to the concept of what is traditional when finding that native title had ceased to exist at the end of the 19th century.

The majority decision in *Yorta Yorta* is contrary to the principles espoused by *Mabo [No.2]* in two ways. The Aboriginal perspective was noticeably trumped in the majority analysis. Questions of abandonment and cessation because of lack of verification in historical records were exemplified by the majority’s inability to appreciate, visualise and accommodate through evidence competing accounts of history. The second saw the majority commence, like the trial judge, at the past and came forward to the present.

Section 223 of the NTA mandates a different approach. It begins with the present. By default, a frozen rights application of s. 223 ensued. Earlier authority and the NTA itself suggest a frozen rights approach is incorrect.

The decision in *Yorta Yorta* was essentially concerned with the manner in which the assessment of the existence of traditional laws and customs under s. 223(1)(a) of the NTA was made. In preferring the written record of Curr to the oral testimony provided by many of the applicants the trial judge, and the majority on appeal who agreed with that approach, required the claimants to compete with the written word, the tradition of western history. In accepting the written evidence of Curr as the most “credible source” a perspective of history was silenced by giving little or no weight to oral history and in discounting the recollections of Aboriginal life provided orally by the members of the Yorta Yorta community. That approach systemically under-valued the culture and heritage of the claimants. The implications of this approach go far beyond the Yorta Yorta people. The majority’s approach has a formal neutrality on its face. The privileged position of a documentary record disadvantages Aboriginal claimants and their oral evidence. Furthermore, it is that neutrality to evidence that is defeating Aboriginal people.

The approach of the majority in *Yorta Yorta* is also contrary to that dictated by the NTA and earlier authority, which make it clear that the starting point for native title claims is the NTA.²⁸⁶ Unless the NTA is read with “an understanding of the novel legal and administrative problems involved in the statutory recognition of native title, its terms may be misconstrued”.²⁸⁷ The results vary but the judgments in *Yarmirr* of the majority,²⁸⁸ Kirby J., and perhaps McHugh J., have a similar structural framework in that they begin with s. 223 of the NTA. The majority opined that the rights and interests that the NTA deals with are rights and interests in relation to land and waters, which can be held

²⁸⁶ *Yarmirr*, *supra* note 7 at 119 per Gleeson C.J., Gaudron, Gummow, and Hayne J.J.; at 180 per Kirby J. Identified again by Kirby J. in *Yorta Yorta* special leave transcript, *supra* note 79 at 14. In particular Kirby J. said it seems “absolutely rudimentary when you look at it....I mean why do not [sic] lawyers address the statute? Lawyers love the common law...[t]hey hate statute.”

²⁸⁷ *Waanyi Case*, *supra* note 47 at 614-615.

²⁸⁸ *Yarmirr*, *supra* note 7 at 119.

communally, as a group or individually.²⁸⁹ Those rights must have three characteristics as prescribed by s. 223. Firstly they are possessed under the traditional laws acknowledged and the traditional customs observed, by the peoples concerned. Secondly, those peoples by those laws and customs must have a connection with the land or waters, and thirdly, the rights and interests must be recognised by the common law of Australia.²⁹⁰ For the majority in *Yarmirr*, the relevant starting point was the question of fact posed by the NTA in s. 223. What are the “rights and interests in relation to land or waters which are possessed under the traditional laws acknowledged, and the traditional customs observed, by the relevant peoples?”²⁹¹ Similarly Justice Kirby in *Yarmirr*, who dissented in part, commenced his analysis with s. 223 of the NTA and espoused a similar description of the provision as a “tripartite requirement for the establishment of native title”.²⁹²

The constitutional character of the NTA is also tripartite and includes the recognition and protection of native title.²⁹³ The first of the enacted objects of the NTA in s. 3(a) is “to provide for the recognition and protection of native title”. Protection has been described by the majority in *Yarmirr*, as supplementing the rights and interests of native holders under the common law of Australia, thereby giving effect to this purpose.²⁹⁴ The second reading speech said the *Native Title Bill 1993* (Cth) “protects native title to the maximum extent practicable.”²⁹⁵ The NTA must be construed according to its terms. Regard to its beneficial purpose is essential in that construction.²⁹⁶ That construction is not confined to a codification of the common law,²⁹⁷ and may operate to change the common law.²⁹⁸

²⁸⁹ *Ibid.* at 120.

²⁹⁰ *Ibid.* at 119.

²⁹¹ *Ibid.* at 122.

²⁹² *Ibid.* at 178 per Kirby J.

²⁹³ *Native Title Act Case*, *supra* note 39 at 453. It includes the recognition and protection of native title; the giving of full force and effect to past acts, and the giving of full force and effect to future acts both of which might not otherwise be effective to extinguish native title.

²⁹⁴ *Yarmirr*, *supra* note 7 at 119. It has also been described as “supplements and reinforces” the common law. See *Wik*, *supra* note 51 at 214. See also s. 3 of the NTA and *Yarmirr*, *supra* note 7 at 180 per Kirby J.

²⁹⁵ Australia, House Representatives, Parliamentary Debates (Hansard), 16 November 1993 at 2879; and Explanatory Memorandum to Native Title Bill 1993 (Cth), Part B, cl 208 (now s 223).

²⁹⁶ *Yarmirr*, *supra* note 7 at 180 per Kirby J.

²⁹⁷ *Ibid.* See also *Native Title Act Case*, *supra* note 39 at 452 and *supra* note 294.

²⁹⁸ *Native Title Act Case*, *supra* note 39 at 452. See also *Yarmirr*, *supra* note 7 at 180 per Kirby J.

Kirby J. remarked in *Yarmirr*, that the Aboriginal rights and interests given legal protection and force by the NTA “build upon, and to the extent of the requirement of recognition, depend upon, the principles of the common law as stated in *Mabo [No.2]*.”²⁹⁹

The significance of the NTA, as identified by Branson and Katz J.J. in *Yorta Yorta*, was that the common law position as to the content of native title remained unchanged under the NTA.³⁰⁰ That misstates the position at the outset. The trial judge made findings about the past and tried to link them to the present. The approach was an inversion of s. 223. The trial judge and the majority in *Yorta Yorta*, commenced in the past at 1788, and sought to trace a path of continuity to the present. In so doing the trial judge found a vacuum in the tradition and observance of the laws in the period of 1880. That defeated the claim. For example the trial judge found fishing was a recreational activity as opposed to a means of “sustaining life” and the “contemporary activity” of the claimant group was concerned primarily with “protection of what are regarded as sacred sites and proper management of the land”.³⁰¹ The trial judge found the preservation of Aboriginal heritage and conservation of the land were “worthy objectives” but “the absence of a continuous link” with the traditional inhabitants of the claim area deprived the “contemporary activities” of the “character of traditional laws acknowledged and traditional customs observed” as required by the NTA. The trial judge found the tide of history had indeed washed away any real acknowledgement of traditional laws and any real observance of traditional customs.³⁰²

The fact that the majority, and the trial judge draw a distinction of time at 1788 as a ground in the NTA is an important indicia in the direction of their decision, because under their analysis changed laws and customs could not be traditional in character if

²⁹⁹ *Yarmirr*, *supra* note 7 at 179 per Kirby J.

³⁰⁰ *Yorta Yorta*, *supra* note 8 at 273.

³⁰¹ *Yorta Yorta Aboriginal Community v. State of Victoria*, *supra* note 285 at para 129 per Olney J.

³⁰² *Ibid.*

they “reflect a breaking with the past rather than the maintenance of the ways of the past in changed circumstances”.³⁰³

Native title rights and interests are defined and characterised by Aboriginal people themselves. The majority demand a clear maintenance of the right or interest from the time of assertion of Crown sovereignty to the present. Furthermore, they commence from an erroneous viewpoint. The recorded views of Curr characterises the Yorta Yorta laws and customs from outside the indigenous paradigm. Consequently, the majority and trial judge expected the right or interest to be maintained throughout time, throughout history as recorded and described by Curr - that is throughout changed circumstances. Yet the form of a tradition will always change. The majority almost corrected the mistake in considering whether a distinction should be drawn between the evolution or modernization of a right and a modern manner of exercising the right.³⁰⁴ A better distinction would be between the content of the tradition and the form. For example the tradition may be to hunt crocodiles or fish as in *Yanner*, yet the form of that tradition was to employ an outboard motor and freeze excess. The majority appeared to embrace such a distinction when looking for analogies.³⁰⁵ Yet the danger in such analogies must also be the subject of caution. The analogies drawn and the distinctions highlighted were dominated by western trains of thought and obviously were western examples. Aboriginal tradition and custom is foreign to the non-Aboriginal. In attempting to characterize the right or tradition or to draw analogies the Aboriginal perspective can be lost. This was a problem. The majority preferred a principally objective test where the primary issue was whether the law or custom had in substance been handed down from

³⁰³ *Yorta Yorta*, *supra* note 8 at 278.

³⁰⁴ *Ibid.* at 280-283. That same distinction was made in *Delgamuukw v. British Columbia* (1993) 104 D.L.R. (4th) 470 at 574 per Wallace J.A. The SCC did not comment upon that distinction in its 1997 decision.

³⁰⁵ *Ibid.* at 279. The analogies considered included “the courtroom ceremonies by which newly appointed judges publicly present their commissions as judges do not fail to be traditional within the ordinary usage of that term where women present their commissions simply because the appointment of women as judges is a relatively recent phenomenon. By analogy a tradition of hunting in a certain area may be maintained notwithstanding that the wildlife available to be hunted may have changed over time (e.g. from possum to rabbit) or the tools used may have changed over time (e.g. from spear to throwing stick to rifle).”

generation to generation.³⁰⁶ Theoretically that seems fine, but in application they required in the handing down from generation to generation an exact format, where both the content and form of the law and custom remained unchanged. Custom, tradition or practice is intrinsic to a particular group irrespective of whether they are indigenous or otherwise. Yet there is an extrinsic imposition of form onto that intrinsic content. The effect is the application of a frozen rights doctrine and disrespect for the tradition, custom or practice.

One of the primary objects of the NTA is the recognition and protection of native title. To commence an analysis of native title rights and interests in the past and require that the rights and interests remain unchanged over time is contrary to that objective and applies a frozen rights approach. The critical question in the analysis under s. 223(1)(a) is whether the claimed native rights and interests are “traditional”. For the majority a review of the authorities revealed that at common law native title could survive modification of the traditionally based laws and customs. However, the majority required that the “laws and customs must remain properly characterised as traditional”.³⁰⁷ That characterisation of “traditional” and the path of discovery divided the majority and minority.

In their summary of the decision, which is not formally part of the reasons of the Court, the Full Court stated “a frozen in time approach to the determination of native title would be incorrect.” In addition, the majority specifically stated that traditional laws and customs could evolve and change over time.³⁰⁸ Yet by default it employed a frozen in time analysis. The adoption, albeit by default, of the frozen rights approach dictates a different method of analysis in the determination of native title claims, because it shackles the Aboriginal custom or tradition of the claimant group. Such an approach does not allow the evolution of Aboriginal people. It imposes a criterion, or a content that is arbitrary and irrelevant to Aboriginal people by asking for a particular society in the extrinsic imposition of a form on the content of the Aboriginal custom, law or

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.* at 278.

tradition. The decision of the majority in *Yorta Yorta* does not permit change. From that prohibition the frozen rights approach ensues.

The majority approach takes one beyond the dynamic of native title rights and interests and subverts the very character of the Aboriginal tradition, custom or practice. It imposes an unfair form onto the content of the tradition. Crystallising Aboriginal practices, traditions and customs at time immemorial freezes the form of the tradition or practice observed or acknowledged. That crystallization is not ever going to be consistent with the Aboriginal view regarding the coming of Europeans and the content of the tradition. That same crystallisation is contrary to the development of the common law.

However, it is trite to recall that recognition by the common law of the rights and interests in land of Aboriginal people is precluded if that recognition fractures a skeletal principle of the common law legal system.³⁰⁹ That is not a problem here; rather the common law principle of evolution is ignored.

Lord Ratcliffe in *Lister v. Romford Ice and Cold Storage Co. Ltd*³¹⁰ in his speech said the common law is a body of law which develops in the process of time in response to the developments of society in which it rules.³¹¹ A movement in the common law occurs, as was seen in the decision in *Mabo [No.2]*. However that movement is not always perceptible at any distinct point in time, yet the fact remains that there is a movement that takes place. In considering the application of Lord Ratcliffe's words to Australia Gummow J. in *Wik* observed there was a "broad vision of gradual change by judicial decision, expressive of improvement by consensus, and of continuity rather than rupture."³¹²

The majority in *Yorta Yorta*, are inhibiting the very common law relied upon in the NTA in applying a frozen rights approach. It is a curious doctrine for the majority to propound

³⁰⁸ *Ibid.* at 280.

³⁰⁹ *Mabo [No.2]*, *supra* note 1 at 43 per Brennan J.

³¹⁰ [1957] A.C. 555.

³¹¹ *Ibid.* at 591.

in the contemporary world. A habit of thought it seems open to the challenge of engendering by past prejudices. Branson and Katz J.J. at the extreme end have suggested a renunciation of the contemporary world.

Comparatively, the Chief Justice in dissent reflects the spirit of *Mabo [No.2]* and decisions such as *Chapman*. The interpretative approach propounded by Black C.J., in *Yorta Yorta*, commands a purposive liberal and favourable construction of native title rights and interests. The learned Chief Justice, like the approach of the dissent in *Van der Peet*, (discussed below) advocated a dynamic rights approach to interpreting the nature and extent of native title rights and interests. A dynamic approach “recognises that distinctive Aboriginal culture is not a reality of the past, preserved and exhibited in a museum”, but a characteristic that has evolved as they have changed modernised and flourished over time” along with the rest of society.³¹³ That favourable construction was evident in two ways. First, in the Chief Justice’s deference to history and the difficulties of historical fact finding and second, the dissents interpretation of the word “traditional” when determining the existence of traditional laws and customs under s. 223(1)(a) of the NTA.

Taking each of those in turn the Chief Justice warned of the difficulties of historical fact finding in native title cases. He said the “dangers inherent in giving particular authority to the written word and more authority when it is repeated” need to be borne in mind.³¹⁴ The Chief Justice observed that it was necessary to bear in mind the particular difficulties and limitations of historical assessments where they are made by “untrained observers writing from their own cultural viewpoint and with their own cultural perceptions and for their own purposes”.³¹⁵ For Black C.J., the works of casual observers of Aboriginal people in mid-colonial times, like the works of Curr, must be looked at with such qualifications and criticisms in mind.³¹⁶ Similarly in *Shaw v. Wolf*³¹⁷ Merkel J. opined

³¹² *Wik*, *supra* note 51 at 179 per Gummow J.

³¹³ *Van der Peet*, *supra* note 15 at 578.

³¹⁴ *Yorta Yorta*, *supra* note 8 at 262-263 per Black C.J.

³¹⁵ *Ibid.* at 261.

³¹⁶ *Ibid.* at 262-263. The external and casual viewer of another culture may see very little because the people observed may intend to reveal very little to an outsider, or because the observer may be

that judicial caution is necessary when “acting on a general historical record or account as evidence disproving a version of history or ancestry of a particular [respondent] based on oral history.”³¹⁸ The case of *Chapman* outlined above was testament to that approach. Accordingly, Black C.J. opined that the use of historical material to answer a claim that is orally based was essential. In remarking upon the strength and virtues of oral evidence the Chief Justice acknowledged the “potential richness and strength” of oral based traditions in native title claims.³¹⁹

The Chief Justice’s interpretation of the word “traditional” when determining the existence of native title rights and interests under s. 223(1)(a) of the NTA allows the dynamics of Aboriginal traditions and customs to evolve, and thereby exist in the contemporary world. Chief Justice Black advocated an analysis under s. 223(1)(a) that commenced in the present because that was where the NTA starts. He observed that the definition in s. 223 was in the language of the present.³²⁰ In his reasons for judgment the Chief Justice discussed what he considered to be the difficulties and dangers in making findings about the expiration of native title at a particular point of time in the past. The advantage of commencing in the present permits “adaptations and evolution to be seen for what they are and, in some instances, to be recognised at all.”³²¹

The Chief Justice said it was wrong to view the word traditional as a concept “concerned with what is dead, frozen or otherwise incapable of change”.³²² He relied heavily upon the literal meaning of the word “tradition”. In *Yarmirr v. Commonwealth*, Beaumont and von Doussa J.J. observed that the meaning of tradition “is that which is handed down by tradition and tradition is the handing down of statements, beliefs, legends, customs from

looking at the wrong time, or because the observer may not know what to look for, or for any one of numerous reasons.
³¹⁷ (1998) 83 F.C.R. 113; 163 A.L.R. 205 [cited to F.C.R.] at 131 per Merkel J.
³¹⁸ *Ibid.*
³¹⁹ *Yorta Yorta*, *supra* note 8 at 261-262 per Black C.J. See also *Commonwealth v. Yarmirr*, *supra* note 88 at 347-350 per Merkel J., and *Mason v. Tritton*, *supra* note 95 at 588-589 per Kirby J.
³²⁰ *Ibid.* at 256.
³²¹ *Ibid.* at 260.
³²² *Ibid.* at 256.

generation to generation, especially by word of mouth or by practice.”³²³ Chief Justice Black referred to the majority in *Yarmirr v. Commonwealth* and the Oxford Dictionary, which gave a similar meaning, again emphasising that tradition is the handing down of statements, especially by word of mouth or by practice and not by writing. The “very notion of tradition” involving transmission of beliefs from one generation to another implied “recognition of the possibility of change”.³²⁴ Applying those perceptions of the word “tradition” and “traditional” Black C.J. held that its import into s. 223 required it have its “roots” in the laws and customs that provided the foundation for the native title that burdened the radical title of the Crown.³²⁵ For Black C.J., the modern form of native rights and interests are “rooted in” traditional practice, custom or tradition.³²⁶ That is their origin can be traced to or found in the original practice of the claimants forbears.

Similarly, Beaumont and von Doussa J.J., in *Yarmirr v. Commonwealth*, in considering s. 223 of the NTA suggested it was not that the rights and interests were acknowledged and observed at any particular date, but that they “flow” from the acknowledgement of traditional laws and the observance of traditional customs.³²⁷ Yet the reasons of Beaumont and von Doussa J.J., are imbued with problems of their own as iterated by Merkel J., in dissent in that case.³²⁸ Yet their remains an implicit endorsement by the High Court on appeal in *Yarmirr*, of the approach of Beaumont and von Doussa J.J., that

³²³ *Commonwealth v. Yarmirr*, *supra* note 88 at 194 per Beaumont and von Doussa J.J., and as referred to in *Yorta Yorta*, *supra* note 8 at 256 per Black C.J.

³²⁴ *Yorta Yorta*, *supra* note 8 at 256 per Black C.J.

³²⁵ *Ibid.*

³²⁶ *Yarmirr*, *supra* note 7 at 196-197 per Kirby J. See also *Mabo [No.2]*, *supra* note 1 at 70 per Brennan J., at 110 per Deane and Gaudron J.J., and at 192 per Toohey J. In *Yarmirr*, *supra* note 7 Kirby J. relies upon those passages.

³²⁷ *Commonwealth v. Yarmirr*, *supra* note 88 at 194 per Beaumont and von Doussa J.J.

³²⁸ It would seem McHugh J., who dissented in *Yarmirr*, *supra* note 7 at 162 [paras 176-177 in particular] prefers the analysis of Merkel J., to that of the majority Beaumont and von Doussa J.J. Merkel J. concurred with Beaumont and von Doussa J.J. on the native title rights, but disagreed with the majority’s analysis of the NTA in particular s. 223 and the issue of exclusivity. McNeil, *supra* note 15 argued Merkel J., took a different perspective on the relationship between native title and traditional laws and customs. McNeil articulated the difference between the majority and minority as the source of native title, where Beaumont and von Doussa J.J., saw native title as arising from the particular laws and customs themselves, whereas Merkel J., preferred the connection with the land or waters by an indigenous community in accordance with their traditional laws and customs. Is there really that much difference? In any event it is the claimant groups’ perspective that is paramount.

the native title rights and interests “flow” from the acknowledgement of traditional laws and the observance of traditional customs.³²⁹

In *Yarmirr*, although not essential to the determination of the case, Kirby J. briefly considered this idea of freezing traditions, custom and practices at time immemorial.³³⁰ In expounding the principle of non-discrimination emerging from international instruments Kirby J. opined that the “culture and laws of indigenous peoples adapt to modern ways of life and evolve in the manner that the cultures and laws of western society do”³³¹ and native title rights and interests evolve least by “being frozen and completely unchangeable”.³³² Kirby J. observed that a frozen rights approach risks rendering Aboriginal people “irrelevant and consequently atrophy”.³³³

In *Chapman*, implicit endorsement of the approach by Black C.J., in *Yorta Yorta*, was also evident.³³⁴ What is Aboriginal tradition was a live issue.³³⁵ That discussion was concerned primarily with Aboriginal tradition as defined in the HPA,³³⁶ but it is also beneficial legislation aimed at protecting and preserving Aboriginal tradition and culture from destructive process.³³⁷ A similar priority resonates in the NTA.³³⁸ In *Chapman*, the Court specifically considered whether beliefs held by only one person were sufficient to constitute an Aboriginal tradition. The proposed bridge was described as culturally destructive because it would “cripple the body and natural functioning of the spirit ancestors, and cause great cultural trauma to Ngarrindjeri people” creating a “permanent

³²⁹ *Yarmirr*, *supra* note 7 at 120-121, 128, 130, 138-139 and 149.

³³⁰ *Ibid.* at 192-197 per Kirby J.

³³¹ *Ibid.* at 192-193.

³³² *Ibid.* at 196-197.

³³³ *Ibid.*

³³⁴ *Chapman*, *supra* note 9 at para 390-400. Note para 398 in particular.

³³⁵ See the analysis in *Chapman*, *supra* note 9 that commences at para 275ff and again at 390-399 where Aboriginal tradition is discussed extensively.

³³⁶ Sections 3, 9, 10, and 28.

³³⁷ *Chapman*, *supra* note 9 at para 249. See also *Tickner*, *supra* note 191 at 221-225. For an area to qualify for protection under s 10 of the HPA it must be a “significant Aboriginal area” which is defined in s. 3 of the Act as an area of “particular significance to Aboriginals in accordance with Aboriginal tradition”. In turn it describes “Aboriginal tradition” to mean “the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.”

³³⁸ See s. 3(a) of the NTA.

and physical connection between Kumarangk and the Mainland, which would be both obscene and sacrilegious to Ngarrindjeri culture.”³³⁹ In the report to the Minister the significance of the area to Aboriginal people was described as “of a very different order” and with “supreme spiritual and cultural significance for the Ngarrindjeri people within the knowledge of Ngarrindjeri women, which concerns the life force itself.” The trial judge made an important comment that remains relevant to all proceedings with an Aboriginal proponent or component. Justice von Doussa opined that each case will “depend upon its facts, and upon the degree of innovation involved” but where a traditional Aboriginal custom or belief “of some antiquity” centrally underpins the belief as modified to accommodate the change, the custom or belief will still be within the notion of “Aboriginal tradition” [as defined in the HPA].³⁴⁰

This change of Aboriginal rights and interests over time is also clearly evident in the decision of *Yanner*. In that case Yanner used a boat with an outboard motor to travel the relevant hunting ground. He used a spear (a traditional harpoon known as a “wock”) in pursuing his native right of crocodile hunting. The High Court was confronted in that case with the evolution of a traditional right to hunt crocodile. The content of the native right remained. That is the tradition of hunting crocodiles. The form or manner in which that traditional interest was pursued had altered. Yet that change in form, not core content, did not preclude or erode Yanner’s traditional native right to hunt. The majority in *Yanner* held that regulating particular aspects of the relationship with traditional land did not sever the connection of the Aboriginal peoples with the land. Regulation may require the form of the interest or right be varied in order to comply with regulation. The content is not altered; it remains traditional, as an inherent link between the present and the past (not the past and present).

³³⁹ Alleged in a letter from Aboriginal Legal Rights Movement (ALRM) to Mr. Tickner, the Minister in April 1994. Tendered in evidence at hearing and reproduced in part in the reasons for decision of von Doussa J.

³⁴⁰ *Chapman*, *supra* note 9 at para 399.

The case of *Yanner* instructs that the contrasting method of hunting was not inconsistent with the traditional custom.³⁴¹ In *Mabo [No.2]* Brennan J. recognised that the tide of history may have washed away entirely “any real acknowledgment of traditional law and any real observance of traditional customs” so that the foundation of native title has disappeared. The Chief Justice in *Yorta Yorta* was attuned to the same difficulties in the sense that the link with the past may be “tenuous” so that it can no longer be seen as traditional.³⁴² That may well be where the Yorta Yorta people are defeated. Yet they have not had the opportunity in the proceedings to date to prove otherwise. When the form or method of the tradition, that is the means of practice or execution, is or becomes inconsistent with the traditional custom that flows³⁴³ from, is rooted³⁴⁴ in, is founded³⁴⁵ in, or is centrally underpinned³⁴⁶ by the interest, tradition or custom that burdened the Crown’s title at sovereignty it can be said to no longer exist. Identifying adjectives have also been used in Canada. The words “integral” and “distinct” have been employed to determine the existence of the contemporary Aboriginal right.³⁴⁷

The learned Chief Justice in *Yorta Yorta*, summarised the contextual factors, which can assist in determining issues concerning the existence and content of native title rights and interests, but none alone are determinative. They were:

- s. 223 of the NTA directs attention to the present;
- laws and customs that are adapted or evolved may still be traditional if they reflect a continuity of tradition and are “rooted” in the laws and customs that provided the foundation for the native title that burdened radical title; and
- native title rights and interest may continue to exist notwithstanding profound impacts upon, changes to Aboriginal people, dispossession of lands, and the cessation of a traditional - in the sense of pre-contact – lifestyle.³⁴⁸

³⁴¹ *Yanner*, *supra* note 69 at 277 per Gummow J.

³⁴² *Yorta Yorta*, *supra* note 8 at 256 per Black C.J.

³⁴³ *Commonwealth v. Yarmirr*, *supra* note 88 at 194 per Beaumont and von Doussa J.J.

³⁴⁴ *Yorta Yorta*, *supra* note 8 at 256 per Black C.J.

³⁴⁵ *Mabo [No.2]*, *supra* note 1 at 66 per Brennan J.

³⁴⁶ *Chapman*, *supra* note 9 at para 399.

³⁴⁷ *Van der Peet*, *supra* note 15 at 550ff.

³⁴⁸ *Yorta Yorta*, *supra* note 8 at 259-260 per Black C.J. The Chief Justice said it was not intended to constitute a comprehensive list. Rather their relevance is that they identify features that suggest,

Five more should be added:

- different perspectives of history must be embraced;
- the rules of evidence are flexible in order to embrace and fully appreciate the Aboriginal perspective;
- physical occupation of the claimed area is not determinative: whether spiritual and cultural connection with the land has been maintained in other ways than physical occupation is a question of fact involving matters of degree, to be assessed in all the circumstances of a particular case;³⁴⁹
- native title rights and interests must be assessed in respect of the type of Aboriginal practice, custom and tradition; and
- native title rights and interests must be assessed in respect of the particular Aboriginal culture and society.

The last two indicia direct the Courts attention to the assessment of the Aboriginal perspective (emerging through their oral evidence and witnesses) within its own paradigm. That is are the traditions and practices orally presented to the Court important to the claimants in terms of the norms and values of their traditional culture and beliefs. Only then can s. 223 have any real meaning and then the judicially articulated bias of history which requires non-indigenous understanding and sharing of the Aboriginal beliefs is subordinated to the real issue of whether knowing that they are genuinely held we can respect them.

The divergence of approach evident in the court in *Yorta Yorta*, itself points to extant biases in history and time. *Yorta Yorta* is highly relevant today because it is representative of the problems facing the Courts. It seems a contextual approach is the only way of reconciling the majority and the minority in *Yorta Yorta*. Branson and Katz J.J. specifically state they are avoiding a frozen in time approach, yet the lack of

349 together, that the correct approach to an application for the determination of native title will, ordinarily, involve the making of comprehensive findings of fact about what are claimed to be the present (as in current) traditional laws.
Ward, supra note 12 at 383.

context dictates a position that the majority desperately declared it was avoiding. Black C.J. looks contextually at the evidence. The tendency as was seen in the majority judgment of Branson and Katz J.J. is to itemise or define the tradition, custom or practice in terms of western knowledge of history. This creates and articulates an artificial characteristic in the tradition custom or practice. The fact is that the dominant historical regime is western, yet culture tradition and custom are derivatives of a different regime and remain malleable.

The case of *Yorta Yorta* was a head on collision between these two systems of meaning: Aboriginal people and oral tradition and the western concept of history. Nowhere is this more evident than the case of the Mashpee Indians in the United States of America. Mashpee is a small town on Cape Cod, Massachusetts. The Mashpee Wampanoag in 1976 filed a suit in the United States District Court, Boston for land illegally taken from them. A lawyer representing the landowners in the area claimed the Mashpee had no standing to make the claim, as they were not a tribe. A trial was convened in 1977 to determine if in fact they were a tribe. Following a 40-day trial, the judge instructed the jury that they could not find the Wampanoag were a tribe, unless the tribe falls within certain definitions at six points in history. The jury responded that the Mashpee Wampanoag were a tribe in 1834 and 1842, but not 1790, 1869, 1870 and 1976. The dates correspond to key dates in the history of the tribe and its suit, such as the 1834 *Mashpee District Act* and the 1870 incorporation of the town of Mashpee. In 1978 Judge Skinner dismissed the land suit, saying that the Wampanoag were not a tribe and had no standing to sue. In 1979 the First Circuit Court of Appeals upheld Judge Skinner's decision. Later that year, the U.S. Supreme Court declined to hear the case.

Torres and Milun³⁵⁰ in considering the Mashpee Indian case made a significant point that the conflict between these two systems of meaning, (indigenous and the State in the Mashpee case), is really a question of how we can “know” which history is more

³⁵⁰ G. Torres, & K. Milun “Translating Yonnondio: by Precedent and Evidence: The Mashpee Indian Case” in R. Delgado, (ed) *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995).

“true”.³⁵¹ They argue using the Mashpee as an example that there is a difficulty of finding the proper language with which to tell their story or capture the essence of the examples that would prove their claims. They suggest that to require a particular way of telling a story by written documentation for example, not only strips away the nuances of meaning of the tradition or custom to Aboriginal people, but also strips away aspects of history and in so doing “elevates a particular version of events to a non-contingent status”.³⁵²

Torres and Milun argue that when particular versions of events are rendered unintelligible, the corresponding counter-examples that those versions represent lose their legitimacy. The paradigm is those examples that come unstuck from both the cultural structure that grounds them and the legal structure that would validate them.³⁵³ So that Torres and Milun argued, and we see the majority having done exactly the same in *Yorta Yorta*, that the existence of their history renders unrecognisable the culture of which they are part, “simultaneously legitimising the resulting ignorance”.³⁵⁴

3.5 The Canadian experience

The SCC has addressed the issue of giving appropriate weight to oral evidence in Aboriginal cases. The SCC observed in *Van der Peet*, that Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims. In *Delgamuukw*, the SCC reiterated the proposition that an appeal court not interfere with factual findings, but noted that there were exceptions and that appellate intervention is warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating Aboriginal claims when “first, applying

³⁵¹ *Ibid.* at 49.

³⁵² *Ibid.*

³⁵³ There is an avenue of opportunity at this point to suggest critical race theory emerges. I suggest critical race theory in the sense that such legal theorists believe that the traditional forms of legal analysis lack “race consciousness”. I am loath to engage in the discourse, as it requires an adoption of particular language. Yes history has illustrated in some recent Court decisions an ability to wound Aboriginal people as a race. At these early stages of enunciation by the High Court and the pending decision of *Yorta Yorta supra*, note 8 before the High Court it is opined that such discourse is premature. Furthermore, it adds unnecessary biases as this stage.

³⁵⁴ Torres and Milun, *supra* note 350 at 49.

the rules of evidence and second, interpreting the evidence before it.”³⁵⁵ The justification for this approach is in the nature of Aboriginal rights themselves. Interestingly, and necessarily, the Court used law to justify the interference. For example in *Van der Peet*, the SCC held a court must have regard to the Aboriginal perspective,³⁵⁶ and because Aboriginal rights or interests are sui generis a unique approach is demanded to the treatment of evidence.³⁵⁷ That unique approach accords due weight to the Aboriginal perspective. Although that principle was qualified by adding that the accommodation must be done in a manner which does not strain the Canadian legal and constitutional structure.

The approach of the trial judge and the reasons of the SCC on appeal in *Delgamuukw* are informative because it also saw the Court confronted with similar evidentiary difficulties to those present in *Yorta Yorta*. At trial evidence was tendered by the claimants illustrating a Hudson Bay trader in 1810 (before sovereignty in Canada) recorded in his journal the names of the hereditary chiefs. Those names have been passed down through generations and still exist today. Evidence was presented to the Court from those who currently hold the hereditary chief names. The trader also recorded in his journal the importance of the beaver in ceremonial activities of the claimants and the fact that elders would not sell any beaver to him. The trial judge had little regard for this evidence. On appeal Lamer C.J. was all embracing of oral history and held the trial judge erred in giving oral histories, in this case the “Adaawk”³⁵⁸ and “Kingax”³⁵⁹ no weight. The trial judge also erred in discounting the recollections of Aboriginal life provided by members of the Gitksan and Wet’suwet’en, and in discounting the territorial affidavits of chiefs

³⁵⁵ *Delgamuukw*, *supra* note 78 at 1065.

³⁵⁶ *Van der Peet*, *supra* note 15 at 550-551.

³⁵⁷ *Delgamuukw*, *supra* note 78 at 1065.

³⁵⁸ The “Adaawk” is a collection of sacred oral traditions of the Gitksan people. It was presented at the trial as evidence of a component of, and therefore as proof of, the existence of a system of land tenure law internal to the Gitksan. It was offered as evidence of their historical use and occupation of that territory.

³⁵⁹ The “Kungax” is a spiritual song or dance or performance connecting the We’suwet’en people to the land. It was presented to the trial court as proof of the “central significance” of the claimed lands to the “distinctive culture” of the Wet’suwet’en.

regarding each Nations ownership of specific territory.³⁶⁰ The SCC established the flexible rules of evidence outlined above to accommodate the oral histories of Aboriginal peoples. The SCC has ensured oral histories are given the same weight as documentary histories.³⁶¹ However, in a more recent decision of the SCC in *Mitchell v. Canada (Minister of National Revenue)*,³⁶² there is some regression from the position of Lamer C.J. in *Delgamuukw*.

Despite the declaration of flexible rules of evidence to accommodate oral histories in Canada the ultimate interpretation of Aboriginal rights presented to the Court still needs some work. Like Australia some members of the judiciary are not listening to the rights presented to the Court and often re-characterise the right thereby employing a frozen rights analysis under s. 35(1). In any event it is difficult to see how evidence of Aboriginal rights afforded the protection of s. 35(1) can be properly understood from the Aboriginal perspective unless the realities of history and the Aboriginal oral traditions presented to the Courts are not heard.

Van der Peet concerned violation of a fish food licence. In requiring that practices, customs and traditions have continuity with the traditions, customs and practices that existed prior to contact the SCC expressly sought to avoid a frozen rights approach.³⁶³ The SCC observed that because the practices, traditions and customs protected by s. 35(1) are “ones that exist today, subject only to the requirement that they be

³⁶⁰ It was impossible for the SCC, or for that matter the Court of Appeal to make new findings of fact given the enormous complexity of the factual issues. A new trial was ordered.

³⁶¹ *Delgamuukw*, *supra* note 78 at 1065-1078. See also *Marshall*, *supra* note 171 per Binnie J.

³⁶² [2001], S.C.J. No.33. Note in the case of *Mitchell* Aboriginal people in that decision cast the right as right to bring goods across the United States of America and Canadian border duty free and the SCC then re characterised the right as a right to bring goods across the St Lawrence River. See para 30. The SCC says in *Mitchell* that if you accept s. 35 then are accepting Canadian sovereignty. A catch 22 situation, as to whether First Nations people participate in the jurisdiction or do not. Also see Binnie J. at paras 133-144 where he attempts to define identity of Aboriginal people. The broader issue in the case is significant. Underlying sovereignty is absolute in the case, the court is always bound by western constructs and the fact that the United States / Canadian border is a way of asserting sovereignty to the United States. The case suggests the SCC may be reluctant to recognise an Aboriginal right that looks similar in attribute to that of a Canadian right, such as international trade at the USA/Canadian level. Perhaps this decision is a prime example of the way in which the Court domesticates the right in Canada and therefore within the parameters of the constitutional construct of the Court.

³⁶³ *Van der Peet*, *supra* note 15 at 557.

demonstrated to have continuity with the practices, customs and traditions which existed pre-contact.”³⁶⁴

Theoretically this makes sense, but in application it has not occurred. For example, in this case Lamer C.J. found Van der Peet failed to demonstrate that the exchange of fish for money or goods was an integral part of distinctive Sto:lo society that existed prior to contact, although he did acknowledge that the exchange of fish took place. Lamer C.J. characterised the right as an Aboriginal right to fish for necessity. In addition, in proposing the ten interpretative canons to assist in the determination of “integral to the distinctive culture” Lamer C.J. lists as the first canon that the Court must take into account the perspective of Aboriginal peoples themselves.³⁶⁵ Yet that perspective Lamer C.J. asserts must be framed in terms cognisable to the Canadian legal and constitutional structure, and that “because of the purpose of s. 35(1) to reconcile the pre-existence of distinctive Aboriginal societies with the assertion of Crown sovereignty Courts while sensitive to the Aboriginal perspective must also be aware that the Aboriginal right exists within the general legal system of Canada”.³⁶⁶ This imposes a real and substantial threat to Aboriginal rights afforded the protection of s 35(1) as it threatens to assimilate the right, whatever the right, to a common law right known to the “general legal system of Canada”.

L’Heureux-Dube J. in dissent disagreed with how the Sparrow test was applied in *Van der Peet*, and she wanted to reformulate both the necessities of the Aboriginal right and the time period.³⁶⁷ She recognised that the approach adopted by Lamer C.J., of focusing on the right in isolation, considered only discrete parts of Aboriginal culture, separating them from the general culture in which they were rooted.³⁶⁸ L’Heureux-Dube J.

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.* at 550.

³⁶⁶ *Ibid.*

³⁶⁷ Also see the decision of McLachlin J.

³⁶⁸ *Van der Peet*, *supra* note 15 at 578 per L’Heureux-Dube J. For example in the earlier decision of *Jack and Charlie v. R.* (1985), 21 D.L.R. (4th) 641, [1985] 2 S.C.R. 332, the SCC illustrated it was not prepared to look at the right to hunt for ceremonial purposes collectively within the Aboriginal group. Rather it looked at the incident in isolation of the Aboriginal group.

preferred a two-part examination in determining what is an integral part of a distinctive culture:

- what are the necessary characteristics of the Aboriginal right; and
- what is the period of time relevant to the assessment of such characteristics?

Taking each of those in turn, L'Heureux-Dube J. observed that Aboriginal people migrated in response to events such as "war, epidemic, famine, dwindling game reserves" and as a result Aboriginal practices traditions and customs also changed and evolved, "including the utilisation of the land, methods of hunting and fishing" and trade.³⁶⁹ L'Heureux-Dube J. rightly observed that the "coming of Europeans increased this fluidity".³⁷⁰

In respect of the time period L'Heureux-Dube J. found the approach by Lamer C.J. imposed criteria that were arbitrary and irrelevant to First Nations people themselves and imposed an unfair and heavy approach "by crystallising Aboriginal practices, traditions and customs at the time of British sovereignty".³⁷¹ Comparatively, she preferred the substantial continuous period of time necessary for the recognition of Aboriginal rights to be assessed on:

- the type of Aboriginal practices, customs and traditions;
- the particular Aboriginal culture and society; and
- the reference period of 20 to 50 years.³⁷²

In essence, she advocated a time period that is dependent upon the right claimed. This is an approach more likely to nurture the growth and evolution of Aboriginal rights. However, to his credit Lamer C.J. was conscious of the evidentiary difficulty, and indicated the Court was prepared to look at post-contact activity, but a connection or some sort of continuity was still required. This was the difficult element for Van der Peet

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.* at 597.

³⁷² *Ibid.* at 602.

to meet. It was too arbitrary and we can see through the dissent of L'Heureux-Dube J. how this was problematic in the majority judgment.

Furthermore, the dynamic approach advocated in the dissent permits a modern manifestation of the Aboriginal peoples dependence upon fishing. It was more sensitive to the evolution of the communities and looks to the importance of fishing and allows modernisation. This dynamic approach recognises that “distinctive” Aboriginal culture is not “a reality of the past.”³⁷³

Similarly in *Marshall*, the SCC is open to the same challenges. Marshall was a member of the Mi'kmaq Indians, who went fishing for eels. Marshall argued he was entitled to fish for eels by virtue of a treaty right agreed to by the British Crown in the Treaty of Peace and Friendship signed on 10 March 1760. The key passage was a clause that prevented the Mi'kmaq from “traffick, barter or exchange any commodities in any manner but with..... truck houses.”

Specifically Marshall argued that the “truck house” provision incorporated the alleged right to trade and the right to pursue traditional hunting, fishing and gathering activities in support of trade. In interpreting the Aboriginal right the SCC held the treaty rights “are limited to securing necessities – construed in the modern context as equivalent to a moderate livelihood”.³⁷⁴ The SCC interpreted a right to trade from the truck-house provision in the treaty because it would not have been included if there was no right in the first place. Yet the Court equated the concept of “necessaries” to the concept of what Lamer C.J. in *Van der Peet*, described as a “moderate livelihood”³⁷⁵ – where moderate livelihood includes such basics as food, clothing, and housing. It does not include advancement, rather the “day to day needs”.³⁷⁶ To its credit the SCC recognises the importance of putting a contemporary spin on the right. We live in a world that is

³⁷³

Ibid.

³⁷⁴

Marshall, *supra* note 171 at 459.

³⁷⁵

Van der Peet, *supra* note 15 at 126

³⁷⁶

Gladstone, *supra* note 143 at 817.

different, there are no truck-houses now and the SCC did not allow that to undermine the treaty right. Yet that contemporary spin stops short at the “necessaries” of life.

The error in *Marshall*, was therefore to prefer an unduly narrow classification of the right to trade. A more useful focus would have been on the right Marshall asserted based on his own understandings of trading and exchange of goods. The paradox is that the SCC expressly stated in *R. v. Sundown*³⁷⁷ that the courts should not use a “frozen in time approach to treaty rights”.

In *Delgamuukw*, the SCC held that Aboriginal title has three aspects:

- the exclusive right to occupation and use of the land;
- the right to chose what uses the land can be put to, provided it is not put to any use inconsistent with that title; and
- an inescapable economic component.

Emerging from that enunciation by the SCC is an assumption that the content of Aboriginal title has an inherent limit. The fact that the protected uses must not be irreconcilable with the nature of the group’s attachment to their land is the inherent limit. The SCC justifies this limit by reference to the definition of Aboriginal title as *sui generis*. It is an “overarching limit, defined by the special nature of the Aboriginal title”.³⁷⁸ The Court imposed limit allows the reintroduction of a frozen rights approach through a back door. Aboriginal people should have the right to determine if practices are inconsistent with Aboriginal history.³⁷⁹

Similar accusations can be made with respect to self-government constitutionalised under s. 35(1). In *Campbell* Williamson J. read down the scope of self-government. In particular, he suggested the Nisga’a were given land that they needed to manage. That required a social structure. Yet it is really much more than that. Each level of the

³⁷⁷ [1999] 1 S.C.R. 393 at para 32.

³⁷⁸ *Delgamuukw*, *supra* note 78 at 1091.

Nisga'a government is a separate legal entity, which can enter contracts; acquire and hold property; sue and raise money; and has other ancillary powers. A Nisga'a Constitution also exists. Significantly, what emerges is a new constitutional framework, a three level system of government for Canada, all of which are entrenched under the Constitution Acts.³⁸⁰

However, in making those criticisms, there are flickers of hope in the protection to be afforded by s. 35(1). Suggestions that the SCC is listening can be found and are not necessarily confined to s. 35 decisions. In *McLeod Lake Indian Band v. Chingee*³⁸¹ the Court had to consider whether the Band had the authority to determine the method for selection of a Chief and Council of the Bands. The plaintiffs argued that the Band was authorized to determine the method in whatever manner it might choose. They argued the custom was not frozen in time. In accepting that submission the Court perhaps recognizes that the form or method of exercise of Aboriginal rights may evolve. Reed J. accepted the submission of the plaintiffs. The case illustrated as identified by Williamson J., in *Campbell* that not only have Aboriginal peoples in Canada retained post confederation the power to elect their leaders and that Aboriginal peoples have the power to determine how they will make those choices, but that the form or method of the exercise of Aboriginal rights may evolve.

Similarly, Lamer C.J. in *Delgamuukw* said an act of occupation or possession is sufficient to ground Aboriginal title. It was not necessary to prove that the land was a distinctive or integral part of Aboriginal society before the arrival of Europeans.³⁸² In addition, he refers to the notion of continuity and said it is "not an unbroken chain".³⁸³

³⁷⁹ See Macklem, *supra* note 145. The problems that can emerge were highlighted in the Nisga'a Treaty Negotiations. The Federal government asserted the lands would have to be surrendered and then granted back in fee simple to the Nisga'a otherwise the inherent limit would prevail.

³⁸⁰ A fascinating question arises of how Nisga'a Courts can co-exist with s. 96 Courts of Canada. Both are constitutionally entrenched, the Nisga'a through the Treaty under s. 35 and the Canadian Courts under s 96.

³⁸¹ (1998) 165 D.L.R. (4th) 358.

³⁸² *Delgamuukw*, *supra* note 78 at 1098. See *supra* note 197 on this idea of continuity.

³⁸³ *Ibid.* at 1102.

In any event the dynamic of law in culture needs to be embraced, and the dynamic approach advocated by L'Heureux-Dube J. in *Van der Peet* and the principles for acceptance and review of oral evidence from decisions such as *Delgamuukw* suggest some members of the SCC have been listening.

3.6 The contextual approach

The Canadian experience and the recent Australian cases highlight that what is being missed is the fact that native title rights and interests have evolved to become the product of the meeting of two legal systems: indigenous and colonial.³⁸⁴ Harris observed that if Aboriginal rights and interests are the product of the meeting of two legal systems – indigenous and European – then to search for their origins exclusively within either indigenous or European law is to miss the formative interaction between the two.³⁸⁵ It therefore follows that an approach that considers all the evidence before the Court, assessed within its own paradigm and interpreted and valued accordingly will ensure a more balanced approach by the Australian Courts.³⁸⁶ The starting point to this contextual exercise is the NTA. Context is the indispensable handmaiden to the proper characterisation of s. 223(1)(a). The more objective words or test in s. 223 [and perhaps s. 35(1) in Canada] may be what is the right being presented. The words, listen and listen carefully remind the adjudicator that the object of the inquiry under s. 223 of the NTA in Australia [and under the *Sparrow* test as expanded in *Van der Peet*, in Canada] is something other than recognizable western relationships to history and evidence.

The ordinary rules of evidence in Australia must be adapted to accommodate oral tradition. This requires a flexible and contextual approach to history, which ensures the devaluation of Aboriginal people does not ensue, and secondly, that the accommodation and respect of oral evidence, which contains the Aboriginal perspective, is paramount. A

³⁸⁴ See J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L. J. 623-660. See also Harris, *supra* note 4 at 202.

³⁸⁵ Harris, *supra* note 4 at 202.

³⁸⁶ On the value of oral history see A. Roness, & K. McNeil, "Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts" (2000) 39:3 JOW 66.

contextual approach is capable of reviewing evidence through a lense. The prism of history from oral tradition operates as that lense. Looking at history through a prism ensures the reflections of Aboriginal people and their perspectives are not disregarded or more critically systemically under-valued. It also avoids the dangers critical race theorists pound upon. It offers the optimum framework from within which to assess and make determinations of traditional custom. History is a prism through which the judiciary should carefully look. Perhaps settler history is the strong colour of the prism, casting a brighter, written and dominating colour. Yet the Aboriginal perspective of history is also there. It is longer, washed away in parts thereby exhibiting dimness in colour. Dimness means it remains extant, when there is no colour is when it no longer exists. To see those competing colourful rays, requires an inter-disciplinary approach, a subtle self-admission of ignorance of Aboriginal history and tradition. Only then can a frozen rights approach be avoided. Looking through the prism lifts the blindfold and (perhaps extant prejudices), and then the Courts assure the fair resolution of native title claims. The Federal Court is exhibiting a real ability to visualise and accommodate competing history, but it still needs some work. Some judges are good, illustrating a real commitment. Others require direction and the High Court is now on trial to provide that direction.

Chapter Four:

Property Regimes: something old & something new for the coexistence of peoples

4.1 Relationships to land

It has been said that the “ultimate fact about property is that it does not really exist: it is mere illusion.”³⁸⁷ Kevin Gray argued convincingly that he could sell property in thin air and that apart from molecules of thin air there is in fact nothing there.³⁸⁸ It follows that “few concepts are quite so fragile, so elusive and so often misused as the idea of property.”³⁸⁹ Nowhere has such a powerful observation been more aptly applied than Australian native title discourse. Property is a complex relationship at common law, but also an important one because it has consequences such as power, authority, and a right to deal with the subject matter of a thing. Yet indigenous and non-indigenous people have a profoundly different relationship with property. Taking these competing foundations of property and the different characteristics that such relationships propound, the apparent difficulties in native title jurisprudence can be appreciated. Relationships to property in the western domain are precarious enough for the common law property lawyer. Understanding the indigenous relationship is fraught with further difficulties. Placing them both before the Court for adjudication magnifies the problem. The focus of this chapter is the intersection and subsequent interaction of the opposing relationships to land.

There are limits to the use of property as an analytical tool.³⁹⁰ In fact there has been much judicial ink propounded on the tendency – which operates at times unconsciously – to render native title conceptually in terms of common law property principles. Articulation of relationships to land at the point of intersection is highly dependent upon the theoretical coherence of property. These abstract principles of common law property are of little assistance, and are as often as not misleading in native title discourse. Many

³⁸⁷ K. Gray, “Property in Thin Air” (1991) 50:2 Cambridge L. J. 252-307 at 252.

³⁸⁸ *Ibid.*

³⁸⁹ K Gray, & S.F. Gray, “The Idea of Property in Land” in S. Bright, & J. Dewar eds., *Land Law: Themes and Perspectives* (Oxford, New York: Oxford University Press, 1998) at 15.

³⁹⁰ *Yarmirr*, *supra* note 7 at 121; *Yanner*, *supra* note 69 at 264.

judges warn against such a tendency.³⁹¹ It was recognised in *Yanner* that there was a perceived need to differentiate between Aboriginal property and other concepts of property to ensure the bench does not erroneously apply notions of common law property principles.³⁹² Yet some judges take a bundle of rights approach to native title; others prefer an analysis that considers property as a thing or fundamental right to land. The difficulty for Australian Courts is the common law trend to propertise native title in terms of common law notions of property. The very essence of the problem seems to be the Courts split desire to review native claims outside the indigenous paradigm, with preconceived theoretical notions of property. This is the foundation of the Courts differing views, a theoretical difference in what is property and what can be property.³⁹³ What is being missed is the dynamic of native title itself. That is the Aboriginal relationship to the land.

The indigenous perspective needs to be embraced. For that to occur the Courts need to respect the disparate relationships to property. For that respect an analytical framework is necessary and Kevin and Susan Gray [hereinafter the Grays] have provided a useful conceptual tool. In their 1998 article they discuss three ways in which the common law articulates property. It is proposed that their analysis provides a bridge between the two conceptual differences. Before exploring the conceptual framework proffered by the Grays it is useful to consider the disparate relationships at law.

4.1.1 *The Aboriginal relationship to land*

As early as 1921 Lord Haldene in *Amodu Tijani v. Secretary, Southern Nigeria*³⁹⁴ stated that original title of peoples in ceded or conquered territory ought to be recognized even if it did not conform to concepts of ownership known in English law. Aboriginal title in

³⁹¹ *Amodu Tijani v. Secretary, Southern Nigeria* [1921] A.C. 399 at 403; *Yarmirr*, *supra* note 7 at 121; *Yanner*, *supra* note 69 at 266.

³⁹² *Yanner*, *supra* note 69 at 266.

³⁹³ A similar problem can be seen in *Victoria Park Racing & Recreational Grounds Co. Ltd. v. Taylor* (1937) 58 C.L.R. 479 at 255-257. The High Court rejected the plaintiff's submission that there could be property in a spectacle. The question was whether a valuable proprietary right was constituted by the plaintiff's power to exclude the public. What constitutes property troubled the High Court.

³⁹⁴ *Amodu Tijani*, *supra* note 391.

Canada was originally perceived by the common law as a usufructuary right that was recognised by the common law.³⁹⁵ In the contemporary jurisprudence the SCC has stated that the description of “personal and usufructuary” is unhelpful in explaining the various dimensions of Aboriginal title and post *Delgamuukw* that characterization can be regarded as obsolete.³⁹⁶ The *Marshall Cases* of the U.S.A.³⁹⁷ described Aboriginal title as the “perpetual right of possession” and the “right to its exclusive enjoyment in their own way for their own purposes” and a “settled principle that their right of occupancy is considered as sacred as the fee-simple of the whites.”³⁹⁸

In Australian case law the Aboriginal nexus or connection with the land has been characterised as a “spiritual, cultural and social identity”³⁹⁹ as “primarily a spiritual affair rather than a bundle of rights”⁴⁰⁰ and “the clan belongs to the land [rather] than that the land belongs to the clan”⁴⁰¹ and “whatever else it is, it is a religious relationship.”⁴⁰² The connection of Aboriginal people with the land does not consist “in the communal holding of rights” with respect to the land, but rather in Aboriginal peoples’ “spiritual affiliations to a site” on the land and the “spiritual responsibility” for the land.⁴⁰³ Essentially, these comments are characterizing a relationship with property, and it is necessary to keep “well in mind that native title rights and interests not only find their origin in Aboriginal law and custom, they reflect connection with the land.”⁴⁰⁴

³⁹⁵ *Ibid.* at 403-404; *Attorney-General of Southern Nigeria v. John Holt & Co (Liverpool) Ltd* [1915] A.C. 599; *Nii Amon Kotei v. Asere Stool* [1961] 1 Ghana L.R. 492 and *Calder*, *supra* note 128.

³⁹⁶ *Delgamuukw*, *supra* note 78 at 1081 per Lamer C.J. Similar conclusions have been reached in Ghana. See S.K.B. Asante, *Property Law and Social Goals in Ghana 1844-1966* (Ghana: Ghana Universities Press, 1976) at 60-61.

³⁹⁷ See Chief Justice John Marshall of the United States in the trilogy of cases *Johnson v. McIntosh*, *supra* note 128; *Cherokee Nation v. Georgia*, *supra* note 128 and *Worcester v. Georgia*, *supra* note 128.

³⁹⁸ *United States v. Mitchell* [No.2] (1983) 463 US at pp 2295-2296.

³⁹⁹ *Gerhardy v. Brown* (1985) 159 C.L.R. 70 at 136 per Brennan J.

⁴⁰⁰ *Meneling Station*, *supra* note 10 at 358.

⁴⁰¹ *Milirrump*, *supra* note 17 at 269-271.

⁴⁰² *Ibid.* at 167.

⁴⁰³ *Meneling Station*, *supra* note 10 at 358.

⁴⁰⁴ *Ibid.*

Professor WEH Stanner in a lengthy passage summarised the Aboriginal relationship to land in Australia.⁴⁰⁵ There is nothing in the non-Aboriginal literature that captures it so well:

“No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word ‘home’, warm and suggestive though it be, does not match the Aboriginal word that may mean ‘camp’, ‘hearth’, ‘country’, ‘everlasting home’, ‘totem place’, ‘life source’, ‘spirit centre’ and much else all in one. Our word ‘land’ is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The Aboriginal would speak of ‘earth’ and used the word in a richly symbolic way to mean his ‘shoulder’ or his ‘side’. I have seen an Aboriginal embrace the earth he walked on. To put our words ‘home’ and ‘land’ together into ‘homeland’ is a little better but not much. A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we call ‘land’ we took what to them meant hearth, home, the source and locus of life, and everlastingness of spirit. At the same time it left each local band bereft of an essential constant that made their plan and code of living intelligible. Particular pieces of territory, each a homeland, formed a part of a set of constants without which no affiliation of any person to any other person, no link in the whole network of relationships, no part of the complex structure of social groups any longer had all its co-ordinates.”

Aboriginal people in Australia have described their relationship as an “unbreakable connection” to the land.⁴⁰⁶ They do not generally speak of “living there”, rather each

⁴⁰⁵ Professor W.E.H. Stanner in his Boyer Lectures “After the Dreaming” delivered in 1968 and reproduced in the book of his essay: W.E.H. Stanner, *White Man got No Dreaming* (Sydney: ABC Books, 1979) at 230.

⁴⁰⁶ Noel Pearson, as then executive director of the Cape York Land Council in the Cape York Heads of Agreement (an agreement between the Land Council and the Cattlemen’s Union of Australia, Australian Conservation Foundation, the Wilderness Society and the Peninsula Regional Council

family or person “belongs” to the space or territory.⁴⁰⁷ Belonging is directly tied “linguistically” and “experimentally” to a space as well as to a “shared knowledge”.⁴⁰⁸ The sense of belonging shapes Aboriginal life and carries with it a special responsibility.⁴⁰⁹ That notion of responsibility resonates throughout Aboriginal peoples. This represents an inversion of the common law. While non-indigenous persons, High Court and Federal Court judges will never fully understand the shared spatial order of Aboriginal people, it can be respected.⁴¹⁰ To respect that order is to listen to the “Aboriginal law and traditions, and the legal processes of linguistic responsibilities, descriptions, and pathways.”⁴¹¹

In Canada Michael Jackson Q.C., in a report prepared for the Royal Commission on Aboriginal Peoples, has described how for First Nations in Canada, Aboriginal rights represent a cluster of rights and responsibilities that are woven into the spiritual, social, and economic relationships that Aboriginal peoples have to their homelands.⁴¹² That cluster or relationship with land was explained powerfully in the evidence of the Gitskan and Wet-suwet'en peoples in *Delgamuukw*. The hereditary chiefs identified their relationship to their land with distinctive boundaries, exclusivity, and a right to the land.

of ATSIC), media release Cairns 5 February, 1996 at 3 said: “The essential truth is there is an unbreakable connection of Aboriginal people to the land.”

⁴⁰⁷ J. (Sakej) Youngblood Henderson, M.L. Benson, and I.M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell, 2000), at 406 [hereinafter *Aboriginal Tenure*].

⁴⁰⁸ *Ibid.* at 406.

⁴⁰⁹ *Ibid.* at 406-412.

⁴¹⁰ To understand the order is to live within it, learn its teachings, and to act in accordance with the teachings. See *Aboriginal Tenure*, *supra* note 407 at 407.

⁴¹¹ *Ibid.* at 407. On the North American Aboriginal perspective see also “Iyani: It goes this Way” in G. Hobson, ed., *The Remembered Earth: An Anthology of Contemporary American Indian Literature* (Albuquerque: University of New Mexico Press, 1980) at 91. See also Paula Gunn Allen, ed., *Spider Woman’s Granddaughters: Traditional Tales and Contemporary Writing by Native American Women* (New York: Fawcett Columbine, 1990) at 91. Allen translated the unifying vision of land and in that translation said: “It is not a matter of being ‘close to nature’. The relationship is more one of identity, in the mathematical sense, than of affinity. The Earth is, in a very real sense, the same as our self (or selves).” See also L. Little Bear, “Relationship of Aboriginal People to the Land and the Aboriginal perspective on Aboriginal Title” in CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996), cited in Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Coexistence. An Alternative to Extinguishment* (Ottawa: Canada Communication Group, 1994) at 10-11.

⁴¹² M. Jackson Q.C., *A new covenant chain: an alternative model to extinguishment for land claims agreements* (British Columbia: A report prepared for the Royal Commission on Aboriginal peoples, September 1994).

Like the common law and civil law they distinguished between rights of ownership and the grants of rights or privileges of use.⁴¹³ Delgum Uukw, the hereditary chief, addressed the Chief Justice of the Supreme Court of British Columbia about that relationship:

“For us, the ownership of territory is a marriage of the Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life of the land. From such encounters comes power. The land, the plants, the animals and the people all have spirit – they all must be shown respect. That is the basis of our law.

My power is created in my House’s histories, songs, dances and crests. It is recreated at the Feast when the histories are told, the songs and dances performed, and the crests displayed. With the wealth that comes from respectful use of the territory, the House feeds the name of the Chief in the Feast Hall. In this way, the law, the Chief, the territory and the Feast become one. The unity of the Chief’s authority and his House’s ownership of its territory are witnessed and thus affirmed by the other Chiefs at the Feast.”⁴¹⁴

The distinctive nature of the concept of ownership for the Gitskan and Wet-suwet’en was described at trial through anthropological evidence:

“... the land belongs to them, and also, that they themselves belong to the land. ... the Wet-suwet’en do not simply fish and hunt and trap on the land, they are an integral part of those lands.

They live on those lands. Like I explained before, they are part of that land... They belong [to] it and they return back there.

The House group’s proprietary representative, its leader or chief, exercises a reciprocal stewardship vis-à-vis the land, and at the same time, a

⁴¹³ See Joan Ryan (Chief Hanamuxw) Transcript of Proceedings, *Delgamuukw*, *supra* note 116 vol. 80 at 5006-5008 and reproduced in Jackson, *supra* note 412 at 92.

proprietary right towards this land vis-à-vis the claims of other groups or nations. On the one hand, the land is dealt with as a property object between two potentially competitive groups. As such it is subject to ownership..... At the same time, ownership in such societies entails a responsibility to care for that, which is owned. Management and stewardship in such societies require a blend of ownership and tenantry, aggressive control and careful respect. The resultant interweave of competitiveness and rights to ownership, with respectful reciprocity, is manifest in many features and institutions of Gitskan and Wet-suwet'en culture."⁴¹⁵

Within the differences between First Nations societies in Canada and Australian indigenous groups however, there are common characteristics. The common elements to be extracted from the overarching relationship are based upon stewardship and respect. Land is central and sacred to Aboriginal peoples globally, and the relationship is grounded in an abiding respect for the land. Aboriginal people have traditionally a more wholistic approach to the land.⁴¹⁶ Whereas individualism and proprietary ownership are usually the key concepts to the non-indigenous holder of title to land,⁴¹⁷ community, and custodian or stewardship principles are the more key components of the Aboriginal relationship.

4.1.2 *The non-indigenous relationship to property*

⁴¹⁴ Gisday Wa and Degam Uukw, *The Spirit in the Land*, the opening statement of the Gitskan and Wet-suwet'en Hereditary Chiefs in the Supreme Court of British Columbia, May 11, 1987 (Gabriola: Reflections) at 7-8 and reproduced in Jackson, *supra* note 412 at 78.

⁴¹⁵ Opinion report of Dr. Richard Daly, *Their Box Was Full* Vol. 1 at 245-249 reproduced in Jackson, *supra* note 412 at 78.

⁴¹⁶ On the Aboriginal relationship to land in Canada from an indigenous perspective see J.J. Borrows, & L.I. Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary* (Toronto: Butterworths, 1998) where he reproduces extracts from writings of Aboriginal people in Canada.

⁴¹⁷ It has been argued that we are moving in land law towards concepts of stewardship as opposed to self-individual fulfilment. See Gray, *supra* note 387 at 297. See also V.J. Yannacone, "Property and Stewardship – Private Property plus Social Interest equals Social Property" (1978) 23 *Dak. L. Rev.* 71.

Under English law property rights in land historically were created and expressed through stone markers, fences, hedges and other boundary enclosures. It has been argued persuasively by Patricia Seed that the ordinary object – house, fence, or other boundary marker signified ownership.⁴¹⁸ These were the historical signs of declaring ownership that became the English signs of possession.⁴¹⁹ Seed asserted that deploying objects such as houses, gardens and fences to establish title to land was a “unique and remarkable characteristic” of English law.⁴²⁰ She described this enclosure movement as gaining “momentum” during the sixteenth century through the elimination of considerable shared or collective ownership, thereby making a considerable number of people landless. By the time of English colonisation Seed argued enclosing land by fences or hedges meant, “establishing specifically individual ownership”. Through her analysis it becomes obvious that the fencing and or enclosing was critical to early colonies “because it was the customary means of establishing private property.”⁴²¹ Whether a garden, fence or home, enclosed an entire area or merely a portion of it, the boundary or enclosure “symbolized English ownership in a culturally powerful way”.⁴²²

The social order of colonialism was constructed upon these early guideposts of ownership. British land law then “created the idea of land tenure as a necessity of creating a proprietary order” where property came to be “viewed as a device to create social and economic relationships.”⁴²³ Blackstone stated:

“there is nothing which so generally strikes the imagination, and enlarges the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external

⁴¹⁸ P. Seed, *Houses, Gardens, and Fences: Signs of English Possession in the New World: Ceremonies of Possession in Europe's Conquest of the New World* (New York: Cambridge University Press, 1995). In particular see 16-40.

⁴¹⁹ *Ibid.* at 19.

⁴²⁰ *Ibid.* at 19-20.

⁴²¹ *Ibid.* at 20.

⁴²² *Ibid.* at 25.

⁴²³ *Aboriginal Tenure*, *supra* note 407 at 72.

things of the world, in total exclusion of the right of any other individual in the universe.”⁴²⁴

Typically the construction of dwellings and cultivation and enclosure of fields at common law can establish occupation. The valid question raised by Seed was if such actions express ownership to the English settlers and descendants how could it possibly convey intentions and rights “clearly to an audience of indigenous peoples with whom they shared neither language nor cultural tradition?”⁴²⁵ The assumption that these sorts of actions convey ownership in property or land erroneously relies upon “the existence of an audience that shares the cultural system in which the actions speak.”⁴²⁶

The common law arrived in Australia upon settlement in 1788,⁴²⁷ but only so much of it as was “reasonably applicable to the circumstances of the colony”.⁴²⁸ Prior to 1992 the prevailing view was that as a consequence of the doctrine of tenure, which held that the Crown owned all land and that private rights depended upon a grant from the Crown, the rights of Aboriginal people were non-existent.⁴²⁹ The land was considered empty - terra nullius. This was the basis for the decision of Blackburn J. in *Milirrpum v. Nabalco*.⁴³⁰ In *Mabo [No.2]* the High Court rejected the doctrine of terra nullius and held that the Crown acquired sovereignty over the territory and radical title over the land, but not beneficial ownership.

The doctrine of tenures and the doctrine of estates are the building blocks of English land law. The term tenure is used to signify the relationship between tenant and landlord – not

⁴²⁴ Blackstone, *Commentaries on the Law of England* (4 vols., 1st ed., Oxford: Oxford University Press, 1765-1769) reproduced (Chicago: University of Chicago Press, 1979) vol. 1 at para 107.
⁴²⁵ Seed, *supra* note 418 at 38-39.

⁴²⁶ *Ibid.* at 39.

⁴²⁷ *Mabo [No.2]*, *supra* note 1 at 34-38 per Brennan J. (with whom Mason C.J., and McHugh J., agreed), at 79-80 per Deane and Gaudron J.J.; at 122 per Dawson J.; at 206 per Toohey J.; and again confirmed in *Yarmirr*, *supra* note 7 at 129.

⁴²⁸ *Ibid.* at 79 per Deane and Gaudron J.J. See also Blackstone, *supra* note 424.

⁴²⁹ Property law in the common law evolved from the feudal system, that is, all land was originally in the hands of the monarch, which was the only source of legal title. The sovereign granted property where the Crown was the ultimate proprietor of all land. Blackstone suggested Australia only inherited so much of the feudal system as applied at the time of colonisation: at 59.

⁴³⁰ *Milirrpum*, *supra* note 17 at 245.

tenant and land.⁴³¹ The very conception of the doctrine is opposite to the indigenous perspective of a relationship between a people and the land. A landowner under Australian law has been described as being vested with a bundle of rights exercisable with respect to the land.⁴³² A fee simple is the ultimate bundle of rights. It has been described as the “entirety of the powers of use and disposal allowed by law”.⁴³³

Yet the fee simple does not encapsulate the Aboriginal relationship of reverence and respect. Responsibility for the land is not a hallmark of a fee simple interest. Modern law might impose it, but it is not a hallmark. Jackson has described the difference between the fee simple and the indigenous relationship to land in this way:

“Fee simple tenure is the most complete form of land tenure that can be held under the common law system, being of indeterminate duration and carrying with it full rights to beneficial enjoyment and freedom of alienation inter vivos or by will. That beneficial enjoyment is circumscribed only by the law of nuisance and other laws of general application. Fee simple title is defined primarily, in the contemplation of the common law, by reference to the rights which flow from this form of land tenure. For most First Nations, their relationship to their territories is defined principally in terms of the responsibilities which flow from that relationship and which is best captured by the concept of stewardship. The responsibilities of stewardship and conservation for future generations..... it cannot be said that fee simple owners of land... are under a legal obligation to conserve their land and its resources for future generations.”⁴³⁴

This ethic of stewardship and conservation for future generations was described by Jackson as being built into the indigenous relationship with land and it was therefore

⁴³¹ *Attorney-General v. Mercer* (1883) LR 8 App Cas 767, at 771 and followed in *Mabo [No.2]*, *supra* note 1 at 48 per Brennan J.

⁴³² *Minister for the Army v. Dalziel* (1944) 68 C.L.R. 261 at 258 per Rich J.

⁴³³ A. Pollock, *First Book of Jurisprudence*, 4th ed., (Oxford: Oxford University Press, 1918) at 178.

inaccurate to define native title by reference to equivalency to fee simple. It can be seen from the above passage that the fee simple interest known to the common law and the most prized relationship to property is different from the indigenous interest; they do not work in tandem and each interest bespeaks different characteristics.

4.2 The intersection and coexistence of relationships to property

The preceding overview of the opposing relationships to land illustrates that the source of, and essential elements of each are fundamentally different. Yet in native title claims the Aboriginal relationship to land and the non-indigenous relationship intersect. The interesting question is how do the competing relationships interact at the point of intersection in the same piece of land? There are two aspects of that interaction and subsequent intersection that are important. First, at the point of intersection the application of the theoretical foundations of common law property to native title rights and interests hovers like a black cloud. For it is at that point the issue of extinguishment arises and the true character of native title must be determined before extinguishment (or inconsistency) is effected. The second is the possibility of the two interests coexisting simultaneously in the same piece of land.

4.2.1 The application of abstract principles of property

It is useful to look at an analytical approach to property by the Grays as a template in understanding the differences between common law and Aboriginal conceptions of land and creating a framework for the Courts within which to respect such differences. The Grays considered the “gradations” of property; they highlight three ways in which the common law jurisprudence characteristically conceives of property in land.

The first model is described as “property as a fact”. In considering property as a fact the fact of possession is significant rather than ownership.⁴³⁵ The right to the land derives from the fact of possession as opposed to the written deed of title that signifies

⁴³⁴ Jackson, *supra* note 412 at 96-97.

⁴³⁵ Grays, *supra* note 389 at 21.

ownership. This first model concentrates on property in land as a “perception of socially constituted fact”. Masked by the behavioural aspect of possession is one’s nexus with the land. It focuses on the staked out right to be there, where the land is “proper” to one and that one has some “significant self-constituting, self-realizing, self-connection with the land” and the land is to a degree an embodiment of one’s personality and autonomy.”⁴³⁶ A sense of belonging and control emerges and the Grays suggest it is precisely this sense of possessory control that identifies the interest. In *Mabo [No.2]* the High Court was alive to the relevance of this model of property. As the Grays state:

“In *Mabo [No.2]* the Court recognised the impossibility of declaring that, after tens of thousands of years of occupancy, the Aboriginal peoples of Australia were mere ‘trespassers on the land on which they and their ancestors had lived’ and had been converted by European colonisation into ‘intruders in their own homes and mendicants for a place to live’.”⁴³⁷

The second model is founded on the dominant theory that property in relation to land is a bundle of rights exercisable with respect to the land.⁴³⁸ This is property as a right. For the Grays this amounts to property in land as comprising “various assortments of artificially defined jural right”.⁴³⁹ Under this model property in land is removed from the fact of possession and the physical reality of land. Instead it focuses on an abstract construction or conceptual construction of the relationship to the land, so that one has “property in an abstract right rather than property in a physical thing”.⁴⁴⁰ The Grays describe the doctrine of estates as a quantifying doctrine of the grades of abstract entitlement. The fullest of these is the fee simple. Others include the life estate. The Grays describe these abstract estates in land, in place of the land itself, as the object of proprietary rights. It is this model that has had the “profoundest influence on English law”.⁴⁴¹ In addition the Grays described the characteristics identified by Lord

⁴³⁶ *Ibid.* at 19.

⁴³⁷ *Ibid.* at 26.

⁴³⁸ *Minister for the Army v. Dalziel* (1944) 68 C.L.R. 261 at 258 per Rich J.

⁴³⁹ Grays, *supra* note 389 at 27.

⁴⁴⁰ *Ibid.* at 27.

⁴⁴¹ *Ibid.* at 30.

Wilberforce in *Ainsworth* such as permanence and stability, and assumption by third parties as prime examples of the conceptualisation of property in terms of abstract right rather than empirical fact.⁴⁴² In their discussion of this second model they highlight that in *Mabo [No.2]* the High Court finally accepted the indigenous evidence of “pragmatic fact” identified in the first model over this second model of abstract entitlement.

The final model canvassed was property as a responsibility. This model considered property not in terms of an estate or interest, but in terms of each of the “isolable strands of utility or use power” which combine to form the constituent elements of the interest.”⁴⁴³ This model is less widely used or acknowledged in common law jurisprudence. The approach separates and identifies the many elements of utility, which can characterize relationships with land, and then “concedes” the label of property to each individual element identified. Their best description of this third model is that these elements of utility comprise a bundle of individual elements of land-based utility rather than a bundle of rights.⁴⁴⁴ Utilities are described as occupancy, enjoyment, consumption, investment, exploitation and so on.⁴⁴⁵ The elements of utility are held in some sort of balance and their third model focuses on the way in which the precise balance or mix of utilities inherent in any particular land holding is subjected, through State intervention, to an overarching criterion of responsibility. This model incorporates a “concept of restraint” not of right, where the property no longer articulates “the arrogance of entitlement” but expresses a “commonality of obligation”.⁴⁴⁶ When there is an addition to or subtraction from the bundle of utilities enjoyed a movement or transaction of property occurs. However, this third model was also described as immensely fragile.

The Grays argue that what is interesting at common law is that all three alternative models of property “do not exist in resolute opposition” but rather exist simultaneously, intricately intertwined.⁴⁴⁷ For the Grays the concept of property in land “oscillates

⁴⁴² *Ainsworth*, *supra* note 31 at 1247G-1248A.

⁴⁴³ *Grays*, *supra* note 389 at 40.

⁴⁴⁴ *Ibid.* at 40.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Ibid.* at 51.

ambivalently” between the “behavioural, the conceptual, and the obligational” and between the three competing models of property as a fact, property as a right, and property as a responsibility.⁴⁴⁸ The Grays suggest that the real “truth” about property is it is not a “thing”, but rather “a relationship, which one has with a thing”.⁴⁴⁹

Themes of property are resonating throughout native title and indigenous proceedings before the Courts. The possibility of Aboriginal tradition and customary knowledge as property was a live issue in *Chapman*.⁴⁵⁰ Von Doussa J., in *Bulun Bulun*, canvassed that same issue where property or ownership in customary or artistic tradition required determination. The question in *Bulun Bulun*, was whether the Court should admit evidence about Ganalbingu law and customs. That evidence provided that the relationship to the land controls all aspects of society and Aboriginal customary life such as ownership of country relations with other clans, marriage and ceremonial life, and finally its attributes as a life source. The designs and artwork at issue in the case originated from that relationship, so that the artwork was a manifestation of the ancestral customary law of the land.⁴⁵¹

The significant role of property and the application of property principles were very evident in the case of *Fejo*. The proceedings directly confronted the Court with a challenge to land tenure in Australia by two conceptually different perspectives of ownership. Fee simple is the pinnacle of private ownership. A fee simple was for all intended purposes, found to be the equivalent of full ownership.⁴⁵² Native title was extinguished by the grant of a fee simple because the rights were inconsistent with the native titleholders continuing to hold any of the rights or interests that together make up native title.⁴⁵³ Similar references to extinguishment can be found in earlier decisions of

⁴⁴⁸ *Ibid.* at 18.

⁴⁴⁹ *Ibid.* at 15. Also see *Dorman v. Rodgers* (1982) 148 C.L.R. 365 at 372 per Murphy J., (to which the Grays referred) that “in legal usage property is not the land or thing, but is in the land or thing.”

⁴⁵⁰ *Chapman*, *supra* note 9 at para 250 ff.

⁴⁵¹ It is relevant to the damage suffered. In *Milpururru v. Indofurn Pty Ltd.*, (1994) 54 F.C.R. 240; 130 A.L.R. 659 the Court took into account the effect of the unauthorised reproduction of artistic works under customary Aboriginal laws in quantifying the damage suffered.

⁴⁵² *Fejo*, *supra* note 62 at 736.

⁴⁵³ *Ibid.*

the High Court.⁴⁵⁴ At the point of intersection the native title rights were defeated; to have permitted any thing else would have fractured a skeletal principle of the land law of Australia.⁴⁵⁵

The different perceptions of property at common law were perhaps no better highlighted than in the High Court's decision in *Yanner*. At issue in this case was Yanner's traditional native title right to hunt and the contemporary performance of that right. More significantly, relationships to property dominated the decision of the Court. Gleeson C.J., Gaudron and Hayne J.J. comprised the majority and Gummow J. wrote a separate judgment. McHugh and Callinan J.J. dissented.

The majority in *Yanner*, remarked upon the elusiveness of the concept of property. In doing so it recognised that property is usually treated as a bundle of rights. Yet at the same time it cautioned that the bundle of rights theory may have its limits as an analytical tool or accurate description.⁴⁵⁶ The majority in *Yanner* were attuned to the conceptual difficulties of deciding what was meant by property in a subject matter. The term was used by the majority as a description of a legal relationship with a thing. The majority relied on the second model proffered by the Grays.⁴⁵⁷ It openly adopted the analysis of property as a right where a degree of power that is recognised in law as a power permissibly exercised over the thing. The majority pointed out that native title rights and interests must be understood as "a perception of socially constituted fact" as well as "comprising various assortments of artificially defined jural right".⁴⁵⁸ The significant aspect of that socially constituted fact is the spiritual, cultural and social connection with the land.⁴⁵⁹ The *Fauna Act*, like the common law was found by the majority to refer to a relationship with a thing. Such a relationship was characterised by the majority in *Yanner*, as a reference to a "degree of power that is recognised in law as power

⁴⁵⁴ *Mabo [No.2]*, *supra* note 1 at 69 per Brennan J; at 89 per Deane and Gaudron J.J; *Native Title Act Case*, *supra* note 39 at 422, 439; *Wik*, *supra* note 51 at 84.

⁴⁵⁵ See *Mabo [No.2]*, *supra* note 1 at 43 per Brennan J.

⁴⁵⁶ *Yanner*, *supra* note 69 at 264.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.* at 269-270. Referred to in *Yorta Yorta*, *supra* note 8 at 257 per Black C.J.

⁴⁵⁹ *Ibid.*

permissibly exercised over the thing”.⁴⁶⁰ In considering the notion of ownership in *Yanner*, the majority observed that it connotes a legal right to have and to dispose of possession and enjoyment of the subject matter.⁴⁶¹

Gummow J. in a separate judgment opined that the conduct of the appellant was inadequately identified in terms of the statutory definition of “take” and its component such as “hunt”. He found that what was really involved was the manifestation by Yanner of the beliefs, customs and laws of his community.⁴⁶² That manifestation arose from beliefs, customs and laws of a community that were connected to the land. For Gummow J. the content of native title rights and interests is found in the “heterogeneous laws and customs” of Aboriginal people.⁴⁶³ It is a relationship between a community and the land, where the relationship is defined by reference to that community’s traditional laws and customs.⁴⁶⁴ The native title of a community is comprised of “collective rights powers and other interests of that community” which can be exercised by particular sub-groups or individuals in accordance with that community’s traditional laws and customs. Each collective right, power or other interest is an “incident” of that indigenous community’s native title.⁴⁶⁵ The individual exercise was described as the exercise of “privileges” of native title.⁴⁶⁶ The approach of Gummow J. is consistent with certain elements of the Grays first model.

Although in dissent, McHugh J., observed that whatever else property may mean in a particular context, it described a relationship between an owner and an object by reference to the power of the owner to deal with the object to the exclusion of all others.⁴⁶⁷ Consequently, for McHugh J. the vesting of property in fauna was absolute. There was no room for any other interest. Comparatively, Callinan J., also in dissent

⁴⁶⁰ *Ibid.* at 264.

⁴⁶¹ *Ibid.* at 266.

⁴⁶² *Ibid.* at 277.

⁴⁶³ *Ibid.* at 277-278.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.* at 278.

⁴⁶⁶ *Ibid.* at 278-279.

⁴⁶⁷ *Ibid.* at 272 per McHugh J.

talked of the Court couching native title in terms cognisant of the doctrine of estates.⁴⁶⁸ Both Justices McHugh and Callinan oscillate between property as a right and property as a fact. These different characterizations of property are reflected in the ultimate decision reached by the individual justices. Those justices in dissent, McHugh and Callinan J.J found the relevant statute intended “absolute property” in all fauna in the State of Queensland be vested in the Crown. The majority and Gummow J. took a more abstract approach of property as a right. Property in wild animals (fauna) was found to be the Crown’s right. In that interpretation there was room for other interests, so that the legislation had a regulatory effect on Yanner’s native title right to hunt not a prohibitory or extinguishing effect as found by the dissidents.

Whether it be collective rights, powers and other interests of a community, the power of the owner to deal with the land to the exclusion of all others, or a socially constituted fact defined by the spiritual, cultural and social connection with the land, native title emerged from this decision as a relationship with land. The High Court had begun shifting the sands, but more direction was required.

Yarmirr did not really advance the situation. The majority were adamant that it would be erroneous to commence a consideration under the NTA with the pre-conceived notion that the only rights and interests recognised, and therefore protected are of a kind that the common law would traditionally classify as property.⁴⁶⁹ Yet that was not to say that native title rights and interests may not have such characteristics.⁴⁷⁰ Yet the word title, or the fact that land is involved does not necessarily translate into “real property”. In fact native title rights and interests do not require analysis as “property” as traditionally done for common law interests.⁴⁷¹ That is so because the common law recognises relationships with land. Characteristics such as alienability are definitive of the type of relationship. Ownership in a thing was an underlying current in the ultimate reasoning of the majority in *Yarmirr*.

⁴⁶⁸ *Ibid.* at 299 per Callinan J.

⁴⁶⁹ *Yarmirr*, *supra* note 7 at 122.

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.* at 121.

The majority examined the historical rights and title in terms of ownership in the sea and seabed domestically and internationally. The reasons of McHugh J., although in dissent were informed with an awareness of the different relationships of property. For McHugh J., the notion of having rights over water was identified as conceptually difficult. Furthermore, his Honour identified land as an immoveable, where the law of the land depends on *lex situs*. McHugh J. was at pains to review the legislative debates and intention of Parliament in construing the NTA because the dominion over the territorial sea and seabed was the province of the Parliament not the common law.⁴⁷² If the law in Australia was to recognise and enforce exclusive native title rights and interests in territorial seas and the seabed it was to be done by an enactment of Federal Parliament. McHugh J. opined the High Court had no authority to recognize and enforce those rights and interests.⁴⁷³ The difficulty with McHugh J.'s judgement is that the term "waters" is specifically included in the NTA, a legislative enactment of Parliament.

Competing relationships to property also underline the judgment of Kirby J. He specifically made reference to the fact that the claimants under their own legal conception of land made no distinction between law of the land and law of the sea.⁴⁷⁴ The common law property lawyer would immediately differentiate between the two. His Honour exhibited a real ability to appreciate the comparativeness of the competing relationships to property. The fact is, as duly acknowledge by Kirby J., Aboriginal people "do not observe this cultural distinction between land and sea, constructing land and sea property into a seamless web of cultural landscape."⁴⁷⁵ The sea, seabed and sub-soil were an "undifferentiated part of the entirety" of the claimed area.⁴⁷⁶ Kirby J., in making that observation was able to accept the Aboriginal perspective – the Aboriginal relationship to property that the sea, seabed and subsoil were all undifferentiated parts of the entirety of the claimed land. He considered the matter from within the Aboriginal paradigm. For

⁴⁷² *Ibid.* at 163-164 per McHugh J.

⁴⁷³ *Ibid.* at 177-178.

⁴⁷⁴ *Ibid.* at 179 per Kirby J.

⁴⁷⁵ S. Sharp, "Reimagining Sea Space: from Grotius to Mabo", in N. Peterson and B. Rigsby (eds), *Customary Marine Tenure in Australia* (Sydney: University of Sydney, 1998) at 47 as quoted in *Yarmirr*, *supra* note 7 at 179 per Kirby J.

⁴⁷⁶ *Ibid.* at 179-180.

Kirby J., the case required a resolution of this difference in approach. Kirby J. commenced his analysis from this evidentiary fact (the fact that the sea and land is one) presented at trial and uncontested before the High Court. His Honour then considered the NTA's application to the sea and whether that Act in fact differentiated between land and the sea.

The most recent case to consider the scope of native title is the decision of the Full Court of the Federal Court in *Ward*. The application of theoretical concepts of property was obvious. The appeal demanded an explanation and elucidation of the implications and test for, extinguishment in Australia. That required consideration of the specific content of native title, and required an examination of how that interest is extinguished, and whether it can be partially extinguished.⁴⁷⁷ The trial judge found where a third party right was only partially inconsistent with the exercise of native title rights and interests the native title rights and interests revived upon cessation of the inconsistency.⁴⁷⁸ The trial judge employed the test of adverse dominion as propounded by Lambert J.A. in *Delgamuukw* at the Court of Appeal level.⁴⁷⁹

The majority reviewed the authorities extensively in *Ward* in considering the test for extinguishment. Relying upon the majority judgments in *Wik* and *Yarmirr* the test was described as an inconsistency of incidents test or operational inconsistency.⁴⁸⁰ For Beaumont and von Doussa J.J., who comprised the majority the rights and interests of indigenous people that together make up native title were a bundle of rights, where it was possible for some only of those rights to be extinguished, thereby effecting partial

⁴⁷⁷ The issue of partial extinguishment arose in *Yanner*, *supra* note 69 at 268 but the majority found it unnecessary to decide.

⁴⁷⁸ *Ward v. Western Australia*, *supra* note 76 at 508 per Lee J.

⁴⁷⁹ The test of adverse dominion has three components. They are (1) a clear and plain expression of intention by the legislature to extinguish native title; (2) there must be an act authorized by the legislature which brings about permanent adverse dominion; and (3) there must be actual use made of the land which is permanently inconsistent with the continuance of native title and does not merely suspend it.

⁴⁸⁰ Operational inconsistency is a qualification to the inconsistency of incidents test where an inconsistency arising out of the performance of, or building of (a dam for example) is described as operational inconsistency. See *Wik*, *supra* note 51 at 221 per Kirby J., and *Commonwealth v. Yarmirr*, *supra* note 88 at 438-439 per Beaumont and von Doussa J.J., and as approved in *Fejo*, *supra* note 62 at 736-737.

extinguishment. For example they found that the grant of pastoral leases partially extinguished native title.⁴⁸¹ The majority in *Ward* described the test as a comparative exercise between the “legal nature and incidents” of the existing native title and of the “statutory grant”, (for example a pastoral lease) where the question is whether the respective incidents are of a nature that the native title rights and interests cannot be exercised without abrogating rights created by the statutory grant.⁴⁸² In the event that the native title rights and interests cannot be exercised then by “necessary implication” they are extinguished. It would therefore appear that the application of the adverse dominion test in Australia is most unlikely.⁴⁸³

The dissenting judge North J. preferred an analysis that native title was not a bundle of rights but a fundamental right to land. Accordingly, there could be no partial extinguishment of some of those rights. His Honour held that extinguishment could only occur where there was a “total and permanent inconsistency” between the rights granted and the native title. Where a lesser degree of inconsistency existed, native title was not extinguished, but merely temporarily suspended or impaired.

As it now stands there is a divergence in approach as the Federal Court has employed two separate models of analysis. In *Ward*, the majority preferred the bundle of rights analysis. North J., in dissent took a comparative approach to the issue of extinguishment. The matter is unnecessarily complicated by the theories of common law property. The majority in *Ward* indirectly adopt the second model propounded by the Grays perhaps under the conception that was the model to be preferred having regard to the reasoning of the majority in *Yanner*.

⁴⁸¹ Most of the pastoral leases contained reservations that protected Aboriginal peoples’ rights of access and use of the land under lease. In Western Australia this was limited to areas that were “unenclosed and unimproved”. In the Northern Territory the majority found that there had not been total extinguishment in any of the areas, as the explicit protection of the Aboriginal rights was not limited in the same way.

⁴⁸² *Ward*, *supra* note 12 at 181. In particular the majority said the question is “not whether the estate of interest granted had been exercised, in fact, in a way that was incompatible with the exercise of native title rights, but whether it was legally capable of being so exercised.”

⁴⁸³ See *Ward*, *supra* note 12 at 186, and also *Fejo*, *supra* note 62 at 130.

The fact is, as the Grays argued, both alternative models of analysis propounded by the Full Court do not exist in resolute opposition. Whichever model is adopted, an important perspective is being lost. The Aboriginal relationship with the land should remain the determining factor. Native title should be characterised as a relationship with a thing, (land) where that relationship is defined by the traditional laws acknowledged and traditional customs observed by the inhabitants of a territory. The third model, property as a responsibility was lost in the Courts analysis. For Aboriginal people the indicia of the relationship with the land are stewardship, and community interest, which together articulate the Aboriginal responsibility for the land. The concept of property in land does “oscillate ambivalently” between the “behavioural, the conceptual and the obligational” and between competing models of property as a fact, a right and a responsibility. To isolate the Aboriginal relationship with land into one category misses the dynamic of the relationship and the presence of the indicia of all three models.

It is arguable that native title is comprised of rights and interests that have elements of all those concepts described by the Grays. I do not mean to make a shopping list of them, collecting those aspects I prefer for my analysis along the way, but the Grays offer perhaps the best analytical approach available for the common law and the valued recognition of native title rights and interests. Aboriginal people were on the land before colonial settlers arrived. This “property as a fact” was recognised by the Grays. For some Aboriginal people property is also a bundle of jural rights, exercisable by individual members of a community, yet simultaneously shared and stewarded by a obligatory community interest. Those rights are defined by and are rooted in the connection with the land. Through that interest emerges a key aspect of the Grays third model a responsibility to care for the land for future generations.

4.2.2 Coexistence

How the indigenous relationship to land is perceived and interpreted by the Courts dictates the interaction of the two disparate relationships to land. The Crown has the power to disencumber native title, whereby unilateral extinguishment is possible in

Australia in accordance with the clear and plain test. In Canada unilateral extinguishment was possible until 1982 in accordance with the clear and plain test; thereafter it must be done by treaty. Until disencumbered, native title (or Aboriginal title) and the Crown's title coexist.⁴⁸⁴ The very fact indigenous title is seen as a burden on the title of the Crown acquired at sovereignty is acknowledgement of the coexistence of the two distinct interests. In *Yarmirr* the majority confirmed that native title rights and interests could coexist with radical title, and despite the fragile character of native title, as long as such rights and interests were extant they are seen as a burden on the radical title of the Crown.⁴⁸⁵ Radical title acknowledges a framework for co-existence.

The concept of coexistence had its foundation in the obiter comments of the Court in *Mabo [No.2]* and is recently reflected in the decisions of *Ward* and *Yarmirr*. Before considering those cases it is useful to examine the literal meaning of the term. The concept of coexistence is not as problematic as it first appears. In the National Native Title Tribunal fact sheet "List of terms" the term coexistence is described as:

"the existence and exercise of native title rights alongside the rights of others to areas of land or waters. For example, native title rights to go onto the land or to hold ceremonies on it may coexist with the rights of a pastoral leaseholder to graze cattle on the same land. Coexistence is about sharing the land in a way that recognises everyone's rights and interests in the area."⁴⁸⁶

The word "existence" is described in the *Macquarie Dictionary* as "existing" while "co-exist" is defined as "existing together". The word therefore defines two or more things existing at once, that is, simultaneously. Coexistence is therefore the sharing of land in which more than one interest exists at once. It is a manner in which different relationships or interests in land can be accommodated outside of the doctrine of estates

⁴⁸⁴ On this point in Canada see B. Slattery, "Understanding Aboriginal Rights" *supra* note 126 at 731 and *Calder*, *supra* note 128 at 404.

⁴⁸⁵ *Ibid.* at 131.

known to the common law. The notion of rights coexisting in land within common law property regimes is not novel. Property law has always been able to accommodate more than one interest, proprietary in nature, in the same piece of land, such that two or more interests in land, less than fee simple, can coexist. Yet the common law cannot recognise coexistence “in different hands of two rights that cannot both be exercised at the same time”.⁴⁸⁷ The doctrine of estates permits the fragmentation of proprietary interests on the basis of time. The estate is separate from the land. This temporal limitation of rights is a distinguishing characteristic of the English doctrine of estates.⁴⁸⁸

The idea of coexistence was first highlighted in *Mabo [No.2]*, where Brennan J. observed that a native title that confers a “mere usufruct” may leave room for other persons to use the land either contemporaneously or from time to time.⁴⁸⁹ The first practical example emerged in the decision of *Wik*.⁴⁹⁰ Kirby J. found it unlikely that there could have been any parliamentary intention to invest an estate owner with absolute exclusive possession under pastoral leases covering huge areas of land.⁴⁹¹ In *Wik* the High Court found the interests of the pastoralist and the extant native title rights and interests coexisted. At the point of inconsistency, the latter yield. What was developing in these early cases, perhaps unbeknown to the Courts was a move away from the arbitrary exclusion rule at common law, towards reasonable access.⁴⁹² At this preliminary stage of the development of the concept of coexistence a notion of reasonableness emerges.

In *Ward* that notion of reasonableness is articulated and morphed into an abstract question of law. *Ward* provided the first forum for a practical analysis of the idea of coexistence and how it operated. The majority, Beaumont and von Doussa J.J., moved towards this “reasonable access rule”. To do otherwise would perhaps have demarcated a

⁴⁸⁶ NNTT fact sheet “List of terms” (Australia: National Native Title Tribunal, August 2000, revised and reprinted June 2002).

⁴⁸⁷ See *Wik*, *supra* note 51 at 153 per Brennan J; and *Corporation of Yarmouth v. Simmons* (1878) 10 Ch D 518 at 527.

⁴⁸⁸ See W.S. Holdsworth, *A History of English Law* 4th ed., (London: Methuen & Co. Ltd., 1936) (First published 1903) vol. II at 350-352, and vol. VII at 24.

⁴⁸⁹ *Mabo [No.2]*, *supra* note 1 at 57 per Brennan J.

⁴⁹⁰ See K. McNeil, “Coexistence of Indigenous Rights and Other Interests in Australia & Canada” [1997] 3 CNLR 1.

⁴⁹¹ *Wik*, *supra* note 51 at 244, 246 per Kirby J. See also at 154 per Gaudron J.

division, between indigenous and non-indigenous interests in the same piece of land, where one is systemically devalued. However, it cannot be forgotten that common law concepts of property are being arbitrarily imposed upon native rights and interests. In respect to coexistence there may be no alternative. Coexistence involves an interest known to the common law (for example the pastoral lease) and an interest recognised by the common law (the native title rights and interests). To suggest evaluation without some recourse to common law rules of property is fraught with danger in offending the rule enunciated by Brennan J., in *Mabo [No.2]*, that a skeletal principle of law cannot be fractured.

It would seem Beaumont and von Doussa J.J. in *Ward* had their perceptions of common law concepts of property at the forefront of their decision. For example when considering this element of coexistence they considered the most familiar example of a profit a prendre in *Mason v. Clarke*⁴⁹³ where the landowner (a company) leased land but reserved, among other things, the rabbiting rights. The landlord subsequently granted those rabbiting rights to a third party. The grant of rabbiting rights was a profit a prendre and a right enforceable in equity, accordingly the lessee was held to be a trespasser on the incorporeal hereditament – the profit. The relevant question in that case was whether the appellant Mason was at any material time in possession of a profit a prendre, a concurrent interest in the same piece of land, so that he could, without showing title, maintain an action in the nature of trespass against the respondent, that is to say, whether he had good possessory title.

Profit a prendre can be described as proprietary in nature. A profit is enforceable against successors in title and can exist at common law and also under statute. A profit a prendre is characterized as interest that may be enjoyed concurrently with the rights and incidents of land ownership enjoyed by the holder of the estate in land. The purpose of the comparison is to simply illustrate that profits are enforceable limitations on the manner in

⁴⁹² Grays, *supra* note 389 at 38.
⁴⁹³ [1955] A.C. 788.

which another may use and enjoy their land. A profit is a proprietary interest where the profit entitles its holder to enter land and, for example, to take soil or catch rabbits.

Viscount Simonds in addressing the issue in *Mason v. Clarke* referred to *Peech v. Best*⁴⁹⁴ where an owner granted to a grantee the exclusive right of shooting and sporting over the farm and entered into a covenant with him for the quiet enjoyment of that right. He subsequently sold part of the farm to a purchaser who intended to use it as a training stable for racehorses and forthwith erected loose boxes for horses. It was clear that this was detrimental to the exercise of shooting rights, and the question was whether the grantee of those rights could recover damages. In *Peech v. Best*, Scrutton L.J., held the purchaser “had acquired a right which was a profit a prendre, an incorporeal hereditament, which he was entitled to protect from injury either from his grantor or any third party.” More significantly Viscount Simonds in *Mason v. Clarke*, went on to quote Scrutton L.J., in *Peech v. Best*, that “both landlord and sporting tenant must use their land reasonably having regard to the interest of the other, and will be liable for damage caused to the other by extraordinary, non-natural, or unreasonable action.”⁴⁹⁵

The dominant point of the case is that the interests are required to be enjoyed concurrently, and the nature and extent of the rights coexisting depends upon the context or content of the agreement between the parties or the granting legislation. In essence the rights coexisting are determined on a case-by-case basis and notions of reasonableness are relevant in the exercise of those rights. The majority in *Ward*, relied heavily on this concept of coexistence.

What can be seen in the judgment of Beaumont and von Doussa J.J. is the common law scheme of accommodating and recognising concurrent interests in land resonating with interests of native title and other interests in the same piece of land. Practical examples are also evident in *Wik*, where the High Court held that native title rights and interests coexist with the pastoralists’ rights granted pursuant to statute. The majority used the

⁴⁹⁴ [1931] 1 K.B. 1. Referred to in *Mason v. Clarke*, *supra* note 493 at 796.

⁴⁹⁵ *Mason v. Clarke*, *supra* note 493 at 796.

Mason v. Clarke decision to require reasonableness as an essential component or perhaps determinant in coexistence.

However, it is not suggested that coexistence connotes an equal sharing of any part of the subject land. It would seem to be a question of law that is determined on case-by-case basis. One difficulty is what the High Court characterises as “the fragile character” of native rights and interests. In *Wik*, the High Court in that particular factual scenario held the native rights and interests must yield to the extent of any inconsistency. *Wik* dealt with inconsistency between Crown grants and native title rights and interests. It did not deal with the issue of inconsistency between native title rights and Crown appropriations of land for public purposes. *Ward* was the first forum in which this arose. And we saw Beaumont and von Doussa J.J., adopt the operational inconsistency test. They referred to Brennan J. in *Mabo [No.2]*, (which was referred to by Kirby J. in *Wik*) where the issue was addressed in obiter and the conclusion was reached that “reservation of land for future use as a school, a courthouse or a public office will not of itself extinguish native title: construction of the building, however, would be inconsistent with the continued enjoyment of native title which would thereby be extinguished”.⁴⁹⁶ There is therefore a distinction in the majority judgment in *Ward* between Crown grants and Crown appropriations where the inconsistency test is concerned. Where there is a grant one looks to legal inconsistency between the rights granted and the native titleholder rights. Comparatively, in the case of appropriations it is inconsistent use by the Crown that extinguishes the native title. There are two limbs to the inconsistency test according to the majority in *Ward*. This would make sense because native title is described as a burden on the radical title of the Crown, and there is no inconsistency there.

More recently the theme of coexistence emerged strongly in the reasons of Kirby J. in *Yarmirr*. Although he found exclusivity had been maintained, an element of coexistence underlined his reasoning. He could see no reason why a grant of non-exclusive fishing licenses was inconsistent with the continued native title rights and interests of the claimants to enjoy a residue of exclusive elements of their native title rights and interests.

⁴⁹⁶ *Mabo [No.2]*, *supra* note 1 at 68. See also *Wik*, *supra* note 51 at 209-210 per Kirby J.

He recognised that where the specific rights of the license holders prevailed over the traditional entitlement of the claimants to control access to and use of the sea the underlying elements of the title were not extinguished. The two maintained coexistence.⁴⁹⁷ For Kirby J., the fact that native rights and interests could coexist in vast pastoral country, like in the decision *Wik*, there was no reason why they could not also coexist in law in the vastness of sea country. The majority, albeit in a different manner to Kirby J., also moved towards coexistence. The majority found that there was an obvious tension between the rights to “occupy, use and enjoy the waters of the determination area to the exclusion of all others” and “to possess” the waters to the exclusion of all others and on the other hand the rights to fishing navigation and free passage.⁴⁹⁸ The majority rejected the claim to rights to possess, occupy, use or enjoy the claimed area to the exclusion of all others.

4.2.3 *Legal pluralism?*

A key question emerging from this intersection and interaction is the emergence over the years, but perhaps stronger now, of legal pluralism.⁴⁹⁹ Legal pluralism has been described as a “situation in which two or more legal systems co-exist in the same social field”.⁵⁰⁰ The two systems of culture in the context of this thesis (in their relationships to history and land), give rise to different and inconsistent orders of priority and are thereby in conflict. They operate as contrary directives as to the way in which relationships to land, society and even history are perceived and articulated. It has been argued that legal pluralism can manifest itself in either a weak or strong form.⁵⁰¹ What does that mean? It is possibly an oxymoron. If it means the recognition of customs in the evidentiary

⁴⁹⁷ *Yarmirr*, *supra* note 7 at 192-193 per Kirby J.

⁴⁹⁸ *Ibid.* at 144-145.

⁴⁹⁹ There is an abundance of academic writings on the concept of legal pluralism. That literature and theory are beyond the scope of this thesis. Legal pluralism is discussed only in terms of recognition and protection of native title.

⁵⁰⁰ See S. Merry, “Legal Pluralism” (1988) 22 *Law and Society Rev.* 869 at 870. See also M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Oxford: Clarendon Press, 1975). See also J. Griffiths, “What is Legal Pluralism?” (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 1.

⁵⁰¹ Griffiths, *supra* note 499.

material I do not think that is pluralism, weak or otherwise. There is after all one judicial structure.

It has been suggested that indigenous interests are the product of the meeting of two legal systems – indigenous and European.⁵⁰² The work of Harris in Canada is about how two parallel systems, one individual based and the other community based, exist. Harris suggested a “manifestation of contemporary legal pluralism”. An examination in Australia also reveals some manifestation.

Native title is separate from and originates outside of the common law. It is neither an institution of the common law nor a form of common law tenure, yet it is recognised by the common law. The common law developed from the English rule of law and statute. Native title has its origin in the traditional laws acknowledged by and the traditional customs observed by the Aboriginal people.⁵⁰³ The common law and native title are derived from two distinct and disparate sources. There is therefore an “intersection of traditional laws and customs” with the common law.⁵⁰⁴

Having regard to the decisions of the High Court and the Federal Court it seems plausible that there is a legal pluralism operating in Australia to some extent. *Mabo [No.2]* was the first case to hint at such an emergence. In *Yanner* the theme emerged strongly again. Concepts such as coexistence and the theory of radical title to land burdened by native title hint at the two different systems coexisting simultaneously. The fact that native title in *Yarmirr* can exist in the sea, outside of and is not dependent upon the common law or radical title for recognition provides further support. The majority in *Fejo* recognised an element of legal pluralism and the intersecting of disparate sources of a right.⁵⁰⁵ The concept of coexistence in *Ward* also suggests some manifestation of a legal pluralism. Similarly in Canada Lamer C.J. in *Delgamuukw* asked for a legal pluralism approach to an extent in asking for the Aboriginal perspective to be taken into account. The

⁵⁰² J. Webber, “Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples” (1995) 33 Osgoode Hall L. J. 623-660.

⁵⁰³ *Mabo[No.2]*, *supra* note 1 at 58 per Brennan J. See also s. 223 of the NTA.

⁵⁰⁴ *Fejo*, *supra* note 62 at 737.

recognition of legal pluralism is also apparent in two decisions of the Federal Court that did not concern native title applications: *Bulun Bulun*, and *Chapman*.

Although undeniably manifestations of legal pluralism are occurring in native title cases there are several reasons why those manifestations can be no more than fractional. Perhaps the most significant is the High Court's statement that the fragile interest of native title must yield in the event of inconsistency.

The examination of inconsistency reveals the limits of a true legal pluralism. Nowhere was this more apparent than the decision of the majority in *Yarmirr*. The question about continued recognition of native title rights in s. 223(1)(c) requires consideration of whether and how the common law and the relevant native title rights and interests could coexist. For the majority in *Yarmirr*, that was a question of inconsistency.⁵⁰⁶ If the two are inconsistent, the common law prevails. If, as was held in *Mabo [No.2]* in relation to rights of the kind then in issue, there is no inconsistency, the common law will "recognize" those rights. That recognition of native title rights and interests in s. 223(1)(c) by the common law and the NTA dictates a fractured legal pluralism. The criterion of inconsistency prohibits any more than that.

4.3 Native title is a relationship with land

Hohfeld described property as "the physical object to which various legal rights, privileges relate then again - with far greater discrimination and accuracy - the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object."⁵⁰⁷ Justice Finkelstein in *Wily v. St George Partnership Banking Ltd*⁵⁰⁸ said that, for Hohfeld, property is comprised of legal relations not things and those sets of legal relations need not be absolute or fixed.⁵⁰⁹ Property is a term that can be, and is, applied to many different kinds of relationship with a subject matter. It is not "a

⁵⁰⁵ *Ibid.* at 739. See also *Wik*, *supra* note 51 at 177-178 per Gummow J.

⁵⁰⁶ *Ibid.* at 130.

⁵⁰⁷ W. Hohfeld "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale L. J. 16 at 21-22.

⁵⁰⁸ (1999) 84 F.C.R. 423.

⁵⁰⁹ *Ibid.* at 431 per Finkelstein J.

monolithic notion of standard content and invariable intensity”⁵¹⁰ but is the “most comprehensive of all the terms which can be used.”⁵¹¹ It is that comprehensiveness that enables its use as a description of all or any different relationship between a person and a subject matter.⁵¹² Property is not itself a thing or resource but a “legally endorsed concentration of power over things and resources”.⁵¹³ Property is really a relationship with a thing.

The uncertainty of what native title encompasses, whether there is in fact a power to bargain and contractual rights arising out of relationships with third parties and the community proprietary title can be recognized if the indigenous relationship to land is defined within its own parameters, as a relationship with a thing. The contours of that relationship are defined and can be ascertained from the traditional laws acknowledged and the traditional customs observed by a particular community. The Aboriginal relationship to land typically comes before the Court through oral evidence and oral history. The challenge for the Courts, to borrow the words of Professor Stanner, is to respect a different tradition that leaves the interpreter and translator of native title “tongueless and earless towards this other world of meaning and significance”. The property therefore of an Aboriginal group claiming title is an aggregate of the various rights of control and access to the area the subject of the claim as defined by their traditions and customs. So that in particular incidences the native title rights and interests of a group may be so extensive as to be in the nature of a proprietary interest in land a possibility recognised in *Mabo [No.2]*.⁵¹⁴

The Court has begun shifting the sands in decisions like *Yanner*, but the indicia of native title rights and interests need to be set in stone. There should be clear acknowledgement that the Aboriginal relationship with land is a legal relationship with a thing. Only then

⁵¹⁰ *Yanner*, *supra* note 69 at 264-265.

⁵¹¹ *Jones v. Skinner* (1835) 5 LJ Ch (NS) 87 at 90 per Lord Langdale MR.

⁵¹² *Yanner*, *supra* note 69 at 265. Yet the very fact that the word is so comprehensive presents the problem, not the answer to it.

⁵¹³ *Gray*, *supra* note 387 at 299.

⁵¹⁴ *Mabo [No.2]*, *supra* note 1 at 51 per Brennan J. See also *Wik*, *supra* note 51 at 169 per Gummow J.

can Aboriginal perspectives insure their valid inclusion for the recognition and protection of native title.

The High Court has demystified the litigator's perception or view of the court as a winner takes all. The High Court has shown in recent decisions that there is no winner in native title proceedings. We see the High Court in *Yarmirr*, sending a warning, implicit and perhaps not intended, that there will always be an element of shallow victory for parties before the Courts in native title matters. There is no longer a winner takes all; as Lamer C.J. said, "we are all here to stay". This theme of coexistence, sharing, illustrates that it is not about accommodating the indigenous relationship with the land, but instead communicating it and respecting it. Coexistence is an idealistic approach, and articulation of the coexistence or sharing is difficult. We see the High Court, as it did in *Wik*, telling Australians, indigenous and otherwise, to share the country. In *Mabo [No.2]* and *Wik* the High Court said there are times when the two competing interests intersect and interact, and more recently in *Yarmirr*, a decision that ranks equally with *Wik*, and *Mabo [No.2]*, that there are times when the sea must be shared.

Chapter Five

Conclusion: Shifting the Sands

This thesis discusses only a few of the issues that have arisen in native title cases taken to the Australian High Court and Federal Court. The High Court in particular has been a valuable pathfinder for the legislatures. In the last forty years the legal and political landscape in Australia has been significantly and irrevocably altered. By an amendment to the Constitution in 1967, the Federal Parliament was authorised to make special laws for Aboriginal people. Sir Paul Hasluck and authors such as Henry Reynolds began to publish.⁵¹⁵ Vincent Langara and Eddie Mabo began asserting Aboriginal interests. It is only ten years since the *Mabo [No.2]* decision that made it clear that Australia was occupied when settlement began in 1788 and that terra nullius was a fiction. That decision, the most important decision ever made on the subject of native title in Australia, opened the way to legislation - the NTA. Slowly a body of jurisprudence on the subject of native title is developing.

The interpretation of the law concerning native title is an ongoing process, and one cannot define with precision its extent and incidence. Yet that process of articulation through the Courts and under the NTA is ingrained with misleading habits of thought and understanding. A shift in the discourse, first by looking at relationships to history, and secondly, land as property will assist in the emergence of the Aboriginal perspective. A degree of curial deference to these constructive relationships is essential in delineating the tide of history.

The NTA and the decision in *Mabo [No.2]*, elucidate a commitment to the recognition and protection of native title that must be given meaningful content".⁵¹⁶ The High Court has illustrated a willingness to do this. Yet, it must be understood that it is limited in that role. It is permitted to work within the parameters of the constitutional construct - the

⁵¹⁵ The work of authors like Professor Douglas C. Harris and Professor Henry Reynolds in Canada and Australia respectively will become significant in indigenous claims. The contemporary realities of history are very significant in indigenous title litigation.

⁵¹⁶ *Sparrow*, *supra* note 114 at 1108.

Constitution. Merkel J., in *Nulyarimma*, poignantly and succinctly captures this limitation

“...applicants are seeking to remedy wrongs of the past committed against the Aboriginal people. In some instances litigants, even where assisted or represented by legal advisers, have unrealizable expectations of the capacity of the law to remedy past wrongs. However, the Court’s role is to hear and determine, in accordance with law, controversies arising between parties. It is not within the Court’s power, nor is its function or role, to set right all of the wrongs of the past or to chart a just political and social course for the future.”⁵¹⁷

The fact is the jurisdiction of the Courts is limited. It can only do so much. To challenge or bring matters before the Court that require a challenge to that construct are necessarily imbued with problems.

Ordinarily, Courts confine themselves to the issues before them often avoiding the hard issue. *Yarmirr* is testament to the fact that the High Court is perhaps, like the SCC, leading public opinion. We see a real abdication of the political responsibility. The role for the Court is to adjudicate upon claims in accordance with the rule of law. In doing so the Court is to determine, in accordance with its judicial function, what the law is rather than what the law should be. The latter is the function of the legislature.⁵¹⁸

Nowhere is this more evident than the decision of *Cubillo & Gunner v. Commonwealth* more commonly known as the Stolen Generation case.⁵¹⁹ In that decision some findings of fact that were crucial to the success of the claim were readily made, yet the law (and

⁵¹⁷ *Nulyarimma*, *supra* note 5 at 638 per Merkel J.

⁵¹⁸ *Ibid.* at 639. Similar comments are evident in *Re Citizen Limbo* (1989) 92 A.L.R. 81 at 82-83 per Brennan J. His Honour noted it is necessary “always to ensure that lofty aspirations are not mistaken for the rules of law which courts are capable and fitted to enforce.” And “it is essential that there be no mistake between the functions that are performed by the respective branches of government.... it is essential to understand that courts perform one function and the political branches of government perform another.”

⁵¹⁹ *Cubillo*, *supra* note 5.

perhaps the inappropriate defendant - the Church of England would have been the more appropriate target) illustrated Aboriginal peoples recourse to Courts as Governments fail to adequately address the injustices of the past.⁵²⁰

Yet in making all of those criticisms I acknowledge the rule of law, which has been an instrument of injustice, can also “in proper cases, be an instrument of justice in the vindication” of legal rights.⁵²¹

Can a prescription be proffered? It must be acknowledged at the outset that it is a difficult task. It is no easy feat, for Judge, lawyer, political representative, Aboriginal people or even the community at large. The process in the Court of establishing native title rights and interests is highly dependent upon communication. Courts must allow Aboriginal rights to evolve, so that the protection afforded by the NTA, and for that matter s. 35(1) in Canada, is full and all embracing of the social, economic and political aspects of a right in the contemporary world.

The burden of proof for the existence of native title - the requirement of s. 223(1)(a) – is on the native title claimants. If the only source of material to assist in support of that claim is oral evidence of oral traditions and histories the Court must assess it within its own paradigm, not against, nor within the western paradigm. The NTA in its objects demands such an approach.⁵²² Until traditional custom is valued and respected within its own paradigm, not within western relationships to property or history, the words in s. 223(1)(a) are absent any real meaning. Custom as the source of law must be sufficiently embraced for recognition in the appropriate form. That is a form and content as depicted and described by Aboriginal people. The fact is Aboriginal people conceptualise their interests and rights and their relationship with history and land differently. Accordingly, recourse to the Aboriginal perspective is essential and the

⁵²⁰ This point is more dramatically highlighted in *Nulyarimma*, *supra* note 5 at 638-639 per Merkel J.
⁵²¹ *Thorpe*, *supra* note 7 at 775 per Kirby J.

⁵²² Section 3(a) provides for the recognition and protection of native title. The Aboriginal perspective provides significant information on the rights and interests to be protected and those that are recognized.

Courts ability to listen to the evidence presented, oral or otherwise is paramount in respecting and considering that perspective.⁵²³

The cases before the Courts, such as *Yorta Yorta* and *Ward*, make it clear that any determination of native title requires a detailed and perhaps “too” rigorous examination of historical, anthropological and archaeological evidence, as well as evidence of Aboriginal history and “conventional” documentary historical evidence. Justice does not mean literal interpretation of the Constitution. Nor does it mean endless enquiry into the mythology, history, anthropology and traditions of the indigenous people of Australia. Justice means listening to the evidence, oral or otherwise presented to the Court. Each proponent has a right to be heard. Granting equal weight and consideration to the different forms of evidence ensures a contextual and therefore balanced approach by the Courts. Emphasis for Aboriginal people should be on communicating the right, its meaning and content inclusive of the social, economic, and political aspects to the Court. The challenge for Aboriginal claimants is to communicate the right, the challenge for the Court is to listen carefully. Otherwise there is a real risk of systematic devaluation of Aboriginal people. Yet I recognize the difficulty. Members of the bench are listening at a distance, essentially removed from the trial court and the perspectives of Aboriginal people, so that language and source are difficult.⁵²⁴ To enhance that communication I advocate a contextual approach that is inclusive of the Aboriginal perspective.

Native title in Australia requires the Courts to become sophisticated, to understand Aboriginal people, and understand culture. Some judges are good, they are perceptive, and perhaps they empathise. Others are good judges that are good at the law, but they lack the full flavour of inter-disciplinary knowledge. A broad based knowledge approach

⁵²³ See the decision in *Van der Peet*, *supra* note 15 at 550-551. The Court added a criterion of the Aboriginal perspective in its ten interpretative canons. See also the decisions of von Doussa J., in *Chapman*, *supra* note 9; *Bulun Bulun*, *supra* note 88; and Black C.J. in *Yorta Yorta*, *supra* note 8.

⁵²⁴ One further difficulty that has emerged is the adoption of semantics. The word custodian connotes the holder of traditional information custom or practice. It implies a sense of stoicism. The word custodian is static. We associate it with a thing being stored, perhaps held for eternity in a particular and original form. I am at a loss to provide a better word, perhaps practitioner, but similar interpretative problems at law emerge. The important point is to be open to the fact that semantics can be difficult in this area of discourse and unnecessary biases can be relayed.

that is reflective of contextual factors is desirable. No, it is essential.⁵²⁵ Otherwise frontier relationships persist and the dynamics of Aboriginal people and their culture are further washed away by the tide of history. The tide of the past must be embraced to ensure a legitimate future. It requires shifting of the sands.

BIBLIOGRAPHY

Primary Sources

Case Law

- Adeyinka Oyekan v. Musendiku Adele* [1957] 1 W.L.R. 876.
- Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 399.
- Anderson v. Wilson & Or* (2000) 97 F.C.R. 453; 171 A.L.R. 705.
- Attorney-General v. Mercer* (1883) LR 8 App Cas 767.
- Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.*, [1915] A.C. 599.
- Biogen Inc., v. Medeva Plc* (1996) 36 I.P.R. 438 (HL).
- British South Africa Co. v. Companhia de Mocambique* [1893] A.C. 642.
- Bodney v. Westralia Airports Corporation* (2000) 109 F.C.R. 178; 180 A.L.R. 91.
- Brandy v. Human Rights And Equal Opportunity Commission and Ors* (1995) 183 C.L.R. 245; 127 A.L.R. 1.
- Bulun Bulun & Anor v. R. & T. Textiles Pty Ltd* (1998) 86 F.C.R. 244; 157 A.L.R. 193.
- Calder v. Attorney General of British Columbia* [1973] S.C.R. 313; 34 D.L.R. (3d) 145.
- Campbell v. Attorney General British Columbia* [2000] 79 B.C.L.R. (3d) 122
- Chapman v. Luminis Pty Ltd [No.5]* [2001] FCA 1106 (unreported).
- Cherokee Nation v. Georgia* 30 US (5 Pet) 1 (1831)
- Coe v. Commonwealth* (1993) 118 A.L.R. 193.
- Commonwealth of Australia v. Yarmirr* (1999) 101 F.C.R. 171, 168 A.L.R. 426 (Full Court Federal Court).
- Commonwealth v. Yarmirr* (2001) 184 A.L.R.113 (HC).
- Corporation of Yarmouth v. Simmons* (1878) 10 Ch D 518.
- Cubillo & Gunner v. Commonwealth* (2000) 103 F.C.R. 1; 174 A.L.R. 97.

Daniels v. Western Australia [1999] FCA 1541 (unreported).

Davies v. Littlejohn (1923) 34 C.L.R. 174.

Delgamuukw v. British Columbia [1997], 3 S.C.R. 1010.

Delgamuukw v. British Columbia [1993] 104 D.L.R. (4th) 470.

Dick v. The Queen [1985] 2 S.C.R. 309.

Dietrich v. The Queen (1992) 177 C.L.R. 292.

Dorman v. Rodgers (1982) 148 C.L.R. 365.

Duncan v. State of Queensland (1916) 22 C.L.R. 556.

Edmonton Journal v. Attorney-General for Alberta [1989] 2 S.C.R. 1326.

Fejo v. Northern Territory (1998) 156 A.L.R. 721; 195 C.L.R. 96.

Fourmile v. Selpam Pty Ltd (1998) 80 F.C.R. 151; 152 A.L.R. 294.

Georgiadis v. Australian and Overseas Telecommunications Corporation (1994) 179 C.L.R. 297.

Gerhardy v. Brown (1985) 159 C.L.R. 70.

Guerin v. R. [1984] 2 S.C.R. 325; 13 D.L.R. (4th) 321.

Haida Nation v. British Columbia [2001] BCCA 147.

Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development (1979) 107 D.L.R. (3d) 513.

Hospital Products Ltd., v. United States Surgical Corporation (1984) 156 C.L.R. 41.

Jack & Charlie v. R. [1985] 2 S.C.R. 332; 21 D.L.R. (4th) 641.

John Pfeiffer Pty Ltd v. Rogerson (2000) 172 A.L.R. 625.

Johnson v. McIntosh 21 US (8 Wheat) 543 (1823).

Jones v. Skinner (1835) 5 L.J. Ch (NS) 87.

Koowarta v. Bjelke-Petersen (1982) 153 C.L.R. 168.

Kruger v. Commonwealth (1997) 190 C.L.R. 1; 146 A.L.R. 126.

Lange v. Australian Broadcasting Corporation (1997) 189 C.L.R. 520.

Lansman v. Finland, *Communication of Human Rights Committee* No 511/ 1992, UN DOC CCPR/C/52/D/511/1992 (1994).

Lister v. Romford Ice & Cold Storage Co. Ltd [1957] A.C. 555.

Kartinyeri v. Commonwealth (1998) 195 C.L.R. 337.

McLeod Lake Indian Band v. Chingee (1998), 165 D.L.R. (4th) 358.

Mabo & Ors v. State of Queensland [No. 2] (1992) 175 C.L.R. 1; 107 A.L.R. 1.

Mason v. Clarke [1955] A.C. 788.

Mason v. Tritton (1994) 34 N.S.W.L.R. 572.

Milirrpum v. Nabalco Pty Ltd (1971) F.L.R. 141; [1972-73] A.L.R. 65.

Milpurrurru v. Indofurn Pty Ltd., (1994) 54 F.C.R. 240; 130 A.L.R. 659.

Minister for the Army v. Dalziel (1944) 68 C.L.R. 261.

Minister for Immigration & Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273.

Mitchell v. Canada (Minister of National Revenue), [2001] S.C.J. No. 33.

Moore v. Attorney-General [1929] I.R. 191.

Moore v. Attorney-General [1934] I.R. 44.

Musqueam Indian Band v. Glass [2000] 2 S.C.R. 633.

National Provincial Bank Ltd., v. Ainsworth [1965] A.C. 1175.

Newcrest Mining (W.A.) Ltd v. The Commonwealth (1997) 190 C.L.R. 513; 147 A.L.R. 42.

Nii Amon Kotei v. Asere Stool [1961] 1 Ghana L.R. 492.

North Ganalanja Aboriginal Corporation & Anor v. Queensland & Ors (1996) 185 C.L.R. 595; 135 A.L.R. 225.

Northern Land Council v. Commonwealth (1986) 161 C.L.R. 1; 64 A.L.R. 493.

Nulyarimma v. Thompson (1999) 96 F.C.R. 153; 165 A.L.R 621 (FC FC)

Nulyarimma & Ors v. Thompson C18/1999 (4 August 2000) Application for special leave to appeal to the High Court: Gummow, Kirby and Hayne J.J.

Pareroultja v. Tickner (1993) 42 F.C.R. 32; 117 A.L.R. 206.

Peech v. Best [1931] 1 K.B. 1.

Potter v. Broken Hill Proprietary Co Ltd

R. v. Adams [1996], 3 S.C.R. 101, 138 D.L.R. (4th) 657.

R. v. Badger, (1996) 133 D.L.R. (4th) 324.

R. v. Gladstone [1996], 2 S.C.R. 723.

R. v. Keyn (1876) 2 Ex D 63.

R. v. Marshall [1999], 3 S.C.R. 456, 179 D.L.R. (4th) 193.

R. v. NTC Smokehouse Ltd., [1996], 2 S.C.R 672.

R. v. Oakes [1986] 1 S.C.R. 103.

R. v. Pamajewon [1996], 2 S.C.R. 821.

R. v. Sparrow [1990] 1 S.C.R. 1075; 70 D.L.R. (4th) 385.

R. v. Sundown [1997], 1 S.C.R. 393.

R. v. Toohey; Ex Parte Meneling Station Pty Ltd (1982) 158 C.L.R 327; 44 A.L.R. 63

R. v. Van der Peet [1996], 2 S.C.R. 507; 137 D.L.R. (4th) 289.

Radaich v. Smith [1959] 101 C.L.R 209.

Re Citizen Limbo (1989) 92 A.L.R. 81.

Re Newfoundland Continental Shelf [1984] 1 S.C.R. 86.

Re Offshore Mineral Rights of British Columbia [1967] S.C.R. 792.

Re Southern Rhodesia [1919] A.C. 211.

Re Thompson: Ex Parte Nulyarimma (1998) 136 A.C.T.R. 9.

Seas and Submerged Lands Case [NSW v. Commonwealth] (1975) 135 C.L.R. 337; 8 A.L.R. 1.

Sevenoaks, Maidstone & Turnbridge Railway Co. v. London Chatham & Dover Railway Co (1879) 11 Ch D 625.

Shaw v. Wolf (1998) 83 F.C.R. 113; 163 A.L.R. 205.

Skeetchestn v. British Columbia (Registrar of Land Titles) (2000) 80 B.C.L.R. (3d) 233.

St. Catherine's Milling & Lumber Co. v. R. (1888), 14 App. Cas. 46 (P.C.).

Street v. Mountford [1985] A.C. 809.

Taku River Tlingit First Nation v. Ringstad, [1999], B.C.S.C. 30 April 1999, Kirkpatrick J. in Chambers.

Taku River Tlingit First Nation v. Ringstad [1999] B.C.J No. 984

Taku River Tlingit First Nation v. Tulsequah Chief Mine Project [2002] B.C.J. No. 155

Thorpe v. Commonwealth [No.3] (1997) 144 A.L.R. 677; 71 A.L.J.R. 767

Tickner v. Bropho (1993) 40 F.C.R 183; 114 A.L.R. 409.

United States v. California 332 US 19 (1947).

United States v. Louisiana 339 US 699 (1950).

United States v. Maine 420 US 515 (1975).

United States v. Mitchell [No.2] (1983) 463 US

United States v. Texas 339 US 707 (1950).

Victoria Park Racing & Recreational Grounds Co. Ltd. v. Taylor (1937) 58 C.L.R. 479.

Walker v. New South Wales (1994) 182 C.L.R. 45; 126 A.L.R. 321.

Ward & Ors. v. State of Western Australia & Ors (1998) 159 A.L.R. 483 (FC).

Western Australia v. Commonwealth (1995) 183 C.L.R 373; 128 A.L.R. 1.

Western Australia v. Ward (1997) 76 F.C.R. 492.

Western Australia v. Ward (2000) 99 F.C.R. 316; 170 A.L.R. 159 (FC FC).

Wik Peoples v. State of Queensland (1996) 187 C.L.R. 1; 141 A.L.R. 129.

Wilkes v. Johnsen (1999) 21 W.A.R 269; 151 F.L.R. 89.

Wily v. St George Partnership Banking Ltd., (1999) 84 F.C.R. 423.

Woods v. Racine [1983], 2 S.C.R. 173.

Worcester v. Georgia 31 US (6 Pet) 515, 8 L.Ed. 483 (1832)

Yanner v. Eaton (1999) 201 C.L.R. 351; 166 A.L.R. 258.

Yarmirr v. Northern Territory [No.2] (1998) 82 F.C.R 533 (FC).

Yorta Yorta Aboriginal Community v. Victoria [1998] FCA 1606 (unreported).

Yorta Yorta Aboriginal Community v. Victoria (2001) 180 A.L.R. 655; 110 F.C.R. 244

Yorta Yorta Aboriginal Community v. State of Victoria & Ors application for special leave to appeal to the High Court M19/2001, 14 December 2001.

Legislation

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

Canadian Charter of Rights and Freedoms, Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Constitution Act 1901 (Cth)

British North America Act, 1867 (U.K.), 30 & 31 Vict., c.3 (now the *Constitution Act, 1867*).

Fauna Conservation Act 1974 (Q)

Fish Resources Management Act 1994 (WA)

Fisheries Act, R.S.C. 1979, c F-14.

Indian Act, R.S.C. 1985 (5th Supp.) c.1.

Land Act 1910 (Q)

Land Act 1962 (Q)

Native Title Act 1993 (Cth)

Native Title Amendment Act 1998 (Cth)

Nature Conservation Act 1992 (Q)

Nisga'a Final Agreement Act, S.B.C. 1999, c. 2.

Nisga'a Final Agreement Act, S.C. 2000, c. 7.

Racial Discrimination Act 1975 (Cth).

Royal Proclamation, 1763 (U.K.), 1982, c. 11.

Secondary Sources

Secondary material: monographs

Asante, S.K.B. *Property Law & Social Goals in Ghana 1844-1966* (Ghana: Ghana Universities Press, 1976).

Bayefsky, A.F. (ed) *The UN Human Rights Treaty System in the 21st Century* (The Hague, Netherlands: Kluwer Law International, 2000).

Blackstone, *Commentaries on the Law of England* (4 vols., 1st ed., Oxford: Oxford University Press, 1765-1769) reproduced (Chicago: University of Chicago Press, 1979).

Boldt, M., Long, J., & Little Bear, L., eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1996).

Borrows, J.J., & Rotman, L.I., *Aboriginal Legal Issues: Cases, Materials & Commentary* (Toronto: Butterworths, 1998).

Curr, E.M. *Recollections of Squatting in Victoria, then called the Prot Phillip District (from 1841-1851)* (Melbourne: George Robertson, 1883).

Curr, E.M. *The Australian Race: its origin, languages, customs, place of landing in Australia and the routes by which it spread itself over that continent* (Melbourne: Victorian Government Printer, 1886).

Delgado, R. (ed) *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995).

Goot, M, & Rowse, T. (eds), *Make a Better Offer: The Politics of Mabo* (Sydney: Pluto Press, 1994).

Harris, D.C. *Fish, Law and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001).

Hasluck, P. *Black Australians* (Melbourne: University of Melbourne Press, 1942).

Havemann, P. (ed), *Indigenous Peoples Rights in Australia, Canada, & New Zealand* (New Zealand: Oxford University Press, 1999).

Hogg, P.W. *Constitutional Law of Canada*, 4th student ed. (Toronto: Carswell, 1996).

Holdsworth, W.S. *A History of English Law* 4th ed., (London: Methuen & Co. Ltd., 1936) (First published 1903).

Hooker, M.B. *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975).

McNeil, K. *Defining Aboriginal Title in the 1990's: Has the Supreme Court finally got it right?* (Toronto: York University, Robarts Centre for Canadian Studies, 1998).

McNeil, K. *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Native Law Centre: University of Saskatchewan, 2001).

Macklem, P. *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

Mercredi, O. & Turpel Lafonde, M.E. *In the Rapids, Navigating the Future of First Nations* (Toronto: Penguin Books, 1994).

Goran Melander and Gudmundur Alfredsson (eds.) *The Raoul Wallenberg Compilation of Human Rights Instruments* (The Hague, Netherlands: Martinus Nijhoff, 1997).

Pollock, A. *First Book of Jurisprudence* (4th ed) (Oxford: Oxford University Press, 1918)

Reynolds, H. *Aboriginal Land Rights in colonial Australia* (Canberra: National Library of Australia, 1988).

Reynolds, H. *Aborigines and settlers: the Australian experience 1788-1939* (Melbourne: Cassell, 1972).

Reynolds, H. *Dispossession, Black Australians and white invaders* (Sydney: Allen & Unwin, 1989).

Reynolds, H. *Frontier: Aborigines, settlers, and land* (Sydney: Allen & Unwin, 1987).

Seed, P. *Ceremonies of Possession in Europe's Conquest for the New World* (New York: Cambridge University Press, 1995).

Sharp, A. (ed) 2nd edition *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970's* (New Zealand: Oxford University Press, 1998).

Stanner, W.E.H. *After the Dreaming* (Sydney: ABC Books, 1969).

Tenant, P. *Aboriginal peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990).

Youngblood Henderson, J., Benson, M.L. & Findlay, I.M. *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell, 2000).

Secondary material: articles and reports

Ahenakew, A., "Aboriginal Title and Aboriginal Rights: The impossible and Unnecessary Task of Identification and Definition" in M. Boldt & J. Long & L. Little Bear, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1996).

Australia, House of Representatives, Parliamentary Debates (Hansard), 16 November 1993.

Barnett, K. "Western Australia v Ward: One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis" [2000] Melbourne University Law Review 17

Bartlett, R. "Political & Legislative Responses to Mabo" (1993) 23 UWA L. Review 352

Binnie, I. "The Sparrow Doctrine: beginning of the end or end of the beginning" (1990) Queens Law Journal 217-253.

Blowes, R. & Trigger, D. "Experts, Documents and Lawyers in Native Title Claims: The implications of Daniel v State of Western Australia" Indigenous Law Bulletin March 2000

Borrows, J. "A Genealogy of Law: Inherent Sovereignty and Self-Government" (1992) 30 Osgoode Law Journal 291.

Borrows, J. "Fish and Chips: Aboriginal commercial fishing and gambling rights in the Supreme Court of Canada" (1996) 50 C.R. (4th) 230-244.

Borrows, J. "The trickster: integral to a distinctive culture" (1997) 8 Constitutional Forum 27-32.

Bringing Them Home Report 1996 (Human Rights and Equal Opportunity Commission, report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families) (Canberra: Australian Government Printer Service, 1996).

Cape York Heads of Agreement media release (Cairns: Cape York Heads Agreement, 5 February 1996).

Convention on the Elimination of All Forms of Racial Discrimination (CERD) 660 UNTS 195 (1975 Australia Treaty Series No 40).

Dorsett, S. "Land Law and Dispossession: Indigenous Rights to Land In Australia" in S. Bright, & J. Dewar, (eds.) *Land Law: Themes and Perspectives* (Oxford, New York: Oxford University Press, 1998).

Erasmus, G., "Why can't we talk?" in *The Globe and Mail* Saturday 9, March 2002.

Explanatory Memorandum Part B to the Native Title Bill 1993 (Cth).

Factum of the Appellant, Council of the Haida Nation and Guujaaw on their behalf and on behalf of all members of the Haida Nation, *Haida Nation v. British Columbia* No. CA027999.

Factum of the Respondents, the Minister of Forests and the Attorney General of British Columbia, *Haida Nation v. British Columbia* CA 027999.

Factum of the Respondent, Weyerhaeuser Company Limited, *Haida Nation v. British Columbia* No. CA027999.

Gisday Wa and Degam Uukw, *The Spirit in the Land* (British Columbia: opening statement of the Gitskan and Wet-suwet'en Hereditary Chiefs in the Supreme Court of British Columbia, 11 May 1987).

Gray, K. "Property in Thin Air" (1991) 50:2 Cambridge Law Journal 252-307

Gray, K. & Gray, S.F. "The Idea of Property in Land" in S. Bright, & J. Dewar, (eds) *Land Law: Themes and Perspectives* (Oxford, New York: Oxford University Press, 1998).

Griffiths, J. "What is Legal Pluralism?" (1986) 24 Journal of Legal Pluralism and Unofficial Law 1.

Gunn Allen, P. (ed) *Spider Woman's Granddaughters: Traditional Tales and Contemporary Writing by Native American Women* (New York: Fawcett Columbine, 1990).

Harris, D.C. "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery" (2000) 34(1) UBC Law Review 195.

Hogg, P.W. & Turpel, M.E. "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 Canadian Bar Review 187-224.

Hohfeld, W. "Fundamental Legal Concepts as Applied in Judicial Reasoning and Other Legal Essays" (1913) 23 Yale Law Journal 16.

Honore, A. "Ownership" in Guest, A. (ed) *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford: Oxford University Press, 1961).

International Covenant on Civil and Political Rights (CCPR) 999 UNTS 171. (1980 Australia Treaty Series No 23).

International Covenant on Economic, Social, and Cultural Rights (CESCR) 993 UNTS 3.

"Iyani: It goes this Way" in G. Hobson, ed., *The Remembered Earth: An Anthology of Contemporary American Indian Literature* (Albuquerque: University of New Mexico Press, 1980).

Jackson Q.C., M. *A new covenant chain: an alternative model to extinguishment for land claims agreements* (British Columbia: A Report prepared for the Royal Commission on Aboriginal Peoples, September 1994).

Jensen, R., "Decolonizing the Colonists" (Vancouver: University of British Columbia, Faculty of Law Ph D Comprehensives, 2001).

Keating, P.J. "Prime Minister's Address to the Nation" 15 November 1993, Redfern Australia.

Leroy Little Bear, "Relationship of Aboriginal People to the Land and the Aboriginal perspective on Aboriginal Title" in CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996), cited in Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Coexistence. An Alternative to Extinguishment* (Ottawa: Canada Communication Group, 1994).

Lyons, O., "Spirituality, Equality, and Natural Law" in M. Boldt & J. Long & L. Little Bear, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto, 1984).

McIntyre, G. "Aboriginal Title: Equal Rights & Racial Discrimination" (1993) 16 UNSW Law Journal 57.

McNeil, K. "Coexistence of Indigenous Rights and Other Interests in Australia & Canada" [1997] 3 CNLR 1.

McNeil, K. "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" (1997) 8:2 Constitutional Forum 33.

McNeil, K. "Aboriginal Title as a Constitutionally Protected Property Right" in Owen Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000).

Merry, S. "Legal Pluralism" (1988) 22 Law and Society Rev. 869.

National Native Title Tribunal fact sheet "List of terms" (Australia: National Native Title Tribunal, August 2000, revised and reprinted June 2002).

Reynolds, H. & Dalziel "Aborigines & Pastoral Leases – Imperial & Colonial Policy 1826-1855 (1996) 19 UNSW Law Journal 315.

Reynolds, H. "The Mabo Judgment in the Light of Imperial Land Policy" (1993) 16 UNSW Law Journal 27.

Reynolds, H. "New Frontiers: Australia" in Havemann, P. (ed) *Indigenous Peoples Rights in Australia, Canada, & New Zealand* (New Zealand: Oxford University Press, 1999).

Roness, A. & McNeil, K "Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts" (2000) 39:3 JOW 6.

Royal Commission on Aboriginal Peoples 1996; Canada (RCAP, Report, 5 vols., Ottawa: CCGP, 1996).

Sax, J.L. "Heritage Preservation as Public Duty: The Abbe Gregoire and the Origins of an Idea" (1990) 88 Michigan Law Rev. 1142.

Sharp, S. "Reimagining Sea Space: from Grotius to Mabo", in N. Peterson and B. Rigsby (eds), *Customary Marine Tenure in Australia* (Sydney: University of Sydney, 1998).

Slattery, B. "First Nations and the Constitution: a question of trust" (1992) 71 Canadian Bar Review 261-293.

Slattery, B. "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727.

Strelein, S. "Conceptualising Native Title" (2001) 23 Sydney Law Review 95.

Transcript of Proceedings *Delgamuukw v. British Columbia* [1997], 3 S.C.R. 1075 volume 80.

United Nations Commission on Human Rights, report of the Working Group on Indigenous Populations, Draft Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/Sub.2/1993/29/Annex I (23 August 1993).

Walters, M.D. "Aboriginal Rights, Magna Carta & Exclusive Rights to Fisheries in the Waters of Upper Canada" (1998) 23 *Queens L.J.* 301.

Webber, J. "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 *Osgoode Hall L.J.* 623.

Webber, R. "The Jurisprudence of Regret: The Search for Standards of Justice in Mabo" (1995) 17 *Sydney Law Review* 5.

Wootten, J.H. "Mabo – Issues and Challenges" (1994) 1 *TJR* 303.

Wootten, J.H. *Proposed Junction Waterhole Dam, Alice Springs, Report* (Sydney: A Report to the Minister for Aboriginal Affairs under s. 10(4) of the Aboriginal & Torres Strait Islander Heritage Protection Act 1984 (Cth), 1992).

Woodward Reports: (Sydney: Aboriginal Land Rights Commission, 1973 and 1974).

- Aboriginal Land Rights Commission Report, 1973
- Aboriginal Land Rights Commission Report, 1974

Yannnacone, V.J. "Property and Stewardship – Private Property plus social Interest equals Social Property" (1978) 23 *Dak. L. Rev.* 71.